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06-180

No. 06-

IN THE

Supreme Court of the United States

RATIONIS ENTERPRISES INC. OF PANAMA, *et al.*,

Petitioners,

v.

HYUNDAI MIPO DOCKYARD CO., LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This matter involves a maritime disaster causing massive damages to numerous parties domiciled in the United States and around the world ("Petitioners") when an ocean-going containership broke in half on a transatlantic voyage en route to the United States due to negligent lengthening of the vessel by a Korean shipyard. Applying United States general maritime law, the United States District Court for the Southern District of New York entered judgment holding the Korean shipyard liable for Petitioners' losses. The United States Court of Appeals for the Second Circuit ("Panel") reversed the District Court's judgment on choice-of-law grounds, finding that Korean law governed Petitioners' claims.

Rather than remand the action to the District Court for adjudication of all Korean-law issues, including the threshold issue of whether the claims were time-barred under Korean law, the Panel in its decision, *sua sponte*, summarily ruled Petitioners' claims time-barred and dismissed the action. After Petitioners sought rehearing to show *inter alia* that the time-bar ruling nullified Korean law by disregarding controlling decisions of the Korean Supreme Court, the Panel denied rehearing, without explanation, in a one-sentence order. As a result, the Panel acted as a court of first instance to decide *sua sponte* a controlling question of Korean law and then by denying rehearing effectively denied an appeal from its own time-bar ruling. This fundamentally unfair and erroneous result presents the following questions for review:

I.

Did the Panel violate 28 U.S.C. § 47, which provides that "[n]o judge shall hear or determine an appeal from the decision of a case *or issue* tried by him" (emphasis supplied), thereby depriving Petitioners of the right of appeal conferred by the Judiciary Act and Federal Rule of Appellate Procedure 3, when it (a) first acted as court of first instance to decide, *sua sponte*, a controlling issue of Korean law, and then (b) by denying rehearing, effectively determined an appeal from its own decision?

II.

Did the Panel by disregarding controlling Korean Supreme Court decisions, violate not only the choice-of-law principles prescribed by this Court in *Lauritzen* and *Romero*, but also this Court's rule that lower federal courts, when applying the chosen law of the relevant state or nation, are bound by *Erie* and *West* to adhere to the decisions of that state's or nation's highest court?[1]

III.

Did the Panel wrongly apply the New York "settlor bar rule" as Substantive Law to bar petitioner timely indemnity claim contrary to its pending that Korean substantive law applied to the action?

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1. *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-3 (1959); *Erie and Co. v. Tompkins*, 304 U.S. 64 (1938); *West v. American Telegraph & Telephone Co.*, 311 U.S. 223, 236 (1940).

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The published Order of the Panel denying rehearing is reproduced at Appendix "A". The Opinion and Order of the Panel in *Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co., Ltd.*, 426 F.3d 580 (2nd Cir. 2005) was decided on October 17, 2005, and is rep ɔduced as Appendix "B". The published Opinion and Order of the United States District Court for the Southern District of New York ("District Court") in *In re Rationis Enterprises, Inc. of Panama*, 325 F.Supp.2d 318 (S.D.N.Y. 2004), was filed on July 9, 2004, and is reproduced as Appendix "C".

JURISDICTION

The Panel denied a timely petition for rehearing on February 27, 2006. On May 18, 2006, Petitioners filed an application to extend the time to file this petition for a writ of certiorari. The application was granted on May 22, 2006 by Justice Ginsburg extending the time to file until July 27, 2006. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. Factual Background

This matter arises out of losses sustained on November 17, 1997 by over 700 cargo owners, most of which are domiciled in the United States, when the fully-laden container ship MSC CARLA split in half during a voyage from Europe to the United States. The casualty occurred when a circumferential fracture developed in the deck structure near a defective weld joining a newly-fabricated 15-meter midbody section to the old body of the vessel when it was

lengthened in Korea.[2] That critical weld was negligently performed by Hyundai Mipo Dockyard, an affiliate and subcontractor of Hyundai Corporation (collectively "Hyundai"), when joining the old forebody to the forward end of the new midbody. None of the Hyundai-created defects was visible. Neither the vessel owner and operator nor vessel personnel had reason to anticipate that the vessel would fail.[3] The cargo owners were insured by various American and foreign cargo insurers, who paid their insureds for the losses resulting from the casualty, thereby becoming subrogated to the rights of their insureds.

2. Trial Court Proceedings

Rationis and MSC commenced a proceeding on December 9, 1997, in the District Court seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act (46 U.S.C. §§ 180 *et seq.*). The owners and insurers of the hundreds of shipments carried on the MSC CARLA ("Cargo Interests") filed claims against Rationis and MSC. In 1998 Cargo Interests also filed third-party complaints against Hyundai seeking recovery based on negligence, strict liability and products liability under

2. MSC CARLA was built in 1979 as a containership. On February 20, 1984, Hyundai Corporation contracted with Brostrom Shipping Co., then the owner of the vessel, to lengthen the M/V Nihon (later sold and renamed MSC CARLA) to carry more containers. Hyundai Corporation subcontracted the work to its shipyard, Hyundai Mipo Dockyard, who fabricated the new midbody, cut the Nihon in half, inserted the new 15-meter midbody and welded the three pieces together. *In re Rationis Enterprises, Inc. of Panama*, 325 F.Supp.2d at 321. In 1997 the vessel was owned by Rationis Enterprises, Inc. ("Rationis"), a Panamanian company, and operated by Mediterranean Shipping Co. ("MSC"), a Swiss company.

3. 325 F.Supp.2d at 327.

U.S. law. Hyundai answered the pleadings alleging that unidentified foreign law applied and denying liability. Additionally, Hyundai commenced two declaratory judgment actions in Korea seeking exoneration from liability.

On July 21, 2000, the District Court issued an anti-suit injunction ordering Hyundai to suspend the Korean actions. *In re Complaint of Rationis Enterprises, Inc.*, 2000 U.S. App LEXIS 10226, 2000 AMC 2613 (S.D.N.Y. 2000). The Second Circuit vacated the injunction and directed the trial court to determine, as a threshold consideration, whether it had personal jurisdiction over Hyundai. *In re Rationis Enterprises, Inc. of Panama*, 261 F. 3d 264 (2d Cir. 2001). On remand, after a special hearing, the District Court concluded that it had jurisdiction. *In re Complaint of Rationis Enterprises, Inc. of Panama*, 210 F. Supp. 2d 421 (S.D.N.Y. 2002). When discovery was completed and the matter was awaiting trial, Hyundai moved for summary judgment contending that under the laws of Korea, Sweden or Panama Cargo Interests could not prevail on any of its liability theories. On January 27, 2003, the District Court concluded that Hyundai had waived the right to invoke foreign law because it had waited too late to specify what foreign law applied and had identified three different jurisdictions whose law might apply without selecting any particular one as to any particular issue. Having found waiver, no choice -of-law analysis was required. The District Court concluded that United States law governed all legal issues. *Cummins Engine Co. v. Hyundai Mipo Dockyard Co.*, 2003 WL 203210 (S.D.N.Y. 2003).

In the meantime, North of England Protection and Indemnity Association ("NOE"), the liability insurer of Rationis and MSC, and the Cargo Interests partially settled the cargo damage claims. NOE in turn filed its own third-

party claim against Hyundai in the limitation proceeding seeking indemnification for the amounts paid to Cargo Interests. Thereafter, Cargo Interests and NOE, as partial assignee and subrogee, (collectively "Petitioners") jointly proceeded against Hyundai to recover the full value of the damage claims.

In April 2003, the case was bifurcated, and the liability issues proceeded to trial. On July 12, 2004, after a two-week trial, the District Court, applying United States general maritime law, issued its findings of fact and conclusions of law, finding that Hyundai had defectively lengthened the vessel and were liable to Petitioners based on theories of negligence, strict liability and products liability. *In re Rationis Enterprises, Inc.*, 325 F.Supp.2d 318 (S.D.N.Y. 2004).

3. Appellate Court Proceedings

Hyundai appealed the District Court's finding of liability, specifying eight issues for appeal. One issue questioned whether Hyundai had waived its right to invoke foreign law; another what law should apply. No *issue designated time-bar under Korean law.*[4] Petitioners did not address that topic in their appellate briefs because Korean time-bar was not a designated issue. Their arguments were confined to the issues

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4. Hyundai's only designated issue on appeal dealing with foreign law stated: "Whether the District Court improperly applied United States law to the claim against HMD and HC in violation of choice-of-law principles." Hyundai's Original Appellate Brief at p. 6. Hyundai, nevertheless, in its appellate brief at p. 19 briefly mentioned that under Korean law the case was time-barred, citing only excerpts from English translations of two Korean statutes, neither of which actually functioned to time-bar the case (See Appendix "G").

designated by Hyundai, including waiver and choice of law. During oral argument, the Second Circuit panel (hereinafter "Panel") concentrated on the waiver and choice-of- law issues, and even instructed the parties to submit post-hearing and supplemental letter briefs regarding choice of law. Both parties complied.[5] The Panel did not request Korean law authorities for the time-bar issue.

Because the parties had not litigated the application of any of these foreign law doctrines in the district court and because time-bar had not been raised as an issue on appeal, Petitioners reasonably believed they were not required to address the proper effect of the Korean statutes of limitations or Hyundai's myriad other substantive foreign law issues in their brief to the panel. The central issue framed on appeal was simply whether the District Court erred in its choice-of-law analysis. Petitioners could not have been expected to respond with complete rebuttals and supporting declarations to the various and sundry substantive issues of four foreign laws invoked by Hyundai, or its amicus, which were casually

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5. Petitioners wrote two supplemental letter briefs on this issue – De Orchis & Partners' letter dated January 10, 2005 (Appendix "L") and Miller & Williamson LLC's letter dated January 15, 2005 (Appendix "D"). The latter's footnote 3 referred to the Declaration of Korean attorney, Byung-Suk Chung, which stated that the case was not time-barred. (Appendix "E") The Chung Declaration was included in the Cargo Claimants' Opposition to Motion for Stay Pending Appeal of the Antisuit Injunctions against Hyundai Mipo Dockyard Co., Ltd. and Hyundai Corporation dated November 19, 2004, as Attachment "B" as well as in Donovan Parry McDermott & Radzik's letter brief dated February 17, 2005 (Appendix "M") as Attachment E. Mr. Chung's declaration and his Supplemental Declaration (Appendix "F") were included in the Special Appendix to North of England and The Cargo Interests' Petition for Rehearing.

inserted into Hyundai's brief.[6] Accordingly, Petitioners did not address the two sentence topic of time-bar under Korean law but instead confined their arguments to the designated appellate issues which included waiver and choice of law.

The Panel issued its opinion, holding that Hyundai had complied with its FRCP 44.1 obligation to timely provide notice of foreign law and reversing the district court's conclusion that Hyundai had waived the right to invoke foreign law. The Panel then conducted the interest analysis mandated by *Lauritzen* and *Romero*, concluding that Korean law applied.

Ignoring the approach used earlier by the Second Circuit in *Carbotrade S.P.A. v. Bureau Veritas*, 99 F.3d 86 (2d Cir. 1996), to determine foreign law, the Panel elected not to remand the case to the District Court for a determination of Korean law. Instead, without inviting the parties to submit materials on Korean time-bar or otherwise conforming to the procedures recommended by the Advisory Committee Notes to Rule 44.1, the Panel, serving as a *de facto* court of first instance, erroneously dismissed the cargo damage claims totaling over $80 million on the ground that under Korean law the claims were time-barred three years *before* the MSC CARLA sank and the cargo losses occurred. The Panel devoted a solitary, conclusory sentence devoid of any explanation or analysis to this outcome-determinative issue citing only two Korean statutes. The Panel said nothing about the timeliness of NOE's indemnity claim. Judgment was then entered against NOE and the Cargo Interests in favor of Hyundai.

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6. For instance, consistent with their longstanding insistence that Swedish law applies to this case, Hyundai argued that (i) Swedish law requirements as to establishing causation in tort were not met, (ii) that Sweden did not recognize products liability claims before 1993, and (iii) that Swedish vicarious liability law precluded NOE's recovery.

The Panel's opinion failed to mention that the Korean Supreme Court on seven separate occasions during the past 27 years had resolved the time-bar issue diametrically opposite to the Panel's ruling and that there were no contrary decisions by Korea's highest court.[7] The only legal authority cited by the Panel to support its conclusion was the reference at footnote 3 of its opinion to unofficial English translations of extracts from the two Korean statutes, namely Article 7 of the Korean Products Liability Act and Article 766 (2) of the Korean Civil Code. These articles establish time-bar periods for products liability and negligence (tort) causes of action, respectively. On its face one statute is inapplicable

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7. Hyundai contended that because Korea is a civil law jurisdiction, *stare decisis* is inapplicable. Hyundai's argument is ill-founded because: (1) Korean statutes recognize precedent — Art. 7(1)(3) of the Korean Court Organization Act provides that "a prior holding of the Supreme Court (Grand Bench or Petty Bench) may be overruled or modified only by plenary decision of the Grand Bench; (2) Korean decisions cite Korean Supreme Court decisions; and (3) the Second Circuit in *Usatorre v. The Victoria*, 172 F. 2d 434, 439 (1949), recognized that "in all civil-law countries, despite conventional protestation to the contrary, much law is judge-made, and the courts are by no means unaffected by judicial precedents...." Moreover, Korean Supreme Court Justice Kim stated that although Korea is a civil-law country "decisions of the Korean Supreme Court are given great deference, and ... are virtually binding on the subsequent judgment of the Supreme Court and the decisions of lower Korean courts. Kim Dec. at SPA-2-4-5. *Curley v. AMR Corp.*, 153 F. 3d. 5 (2d. Cir. 1998), and *Finance One Public Company v. Lehman Brothers Special Financing, Inc.*, 414 F. 3d. 325 (2d. Cir. 2005); decree that precedent should be treated in the same manner the foreign country in question does so. See also *American Intern. Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 261 (5th Cir. 2003) (Appellate decisions from civil law jurisdiction will not be ignored without "persuasive data... that the highest court would decide otherwise....")

due to its effective date, and the other (as a result of a faulty English translation) is ambiguous as to the event which triggers the running of the limitation period.

Petitioners filed a petition for rehearing and supplemented the record with a special appendix concerning Korean time-bar law, consisting of declarations from a Korean law professor and a Korean lawyer, to which were attached controlling Korean Supreme Court decisions and commentary. Those materials establish that Petitioners' claims are not time-barred because (1) the Korean Products Liability Act was not in effect when the casualty occurred; (2) the Korean Supreme Court repeatedly has held in negligence actions with conceptually identical facts to those of this case that tort claims filed, as these were, within ten years of the date of the casualty-related damage are not time-barred; and (3) a textual analysis of Art. 766(2) confirms the Korean Supreme Court's ruling that the codal article's ten-year prescriptive period commences to run when damage occurs, not when negligence is committed. Hyundai then submitted an answer and a supplemental appendix containing declarations from a Korean lawyer, commentators and a retired Korean Supreme Court Justice. At the Panel's request, Petitioners submitted a reply accompanied by another special appendix containing supplemental declarations from the Korean law professor and the Korean lawyer as well as declarations from two retired Korean Supreme Court Justices, one of whom presided over one of the seven controlling Korean Supreme Court decisions.

The petition for rehearing was declined in a single word ("DENIED") (App. C) without a written opinion even though (1) the Panel had ruled on time-bar as a *de facto* court of first instance and then, in violation of 28 U.S.C. § 47, served as its own review body, effectively depriving Petitioners of

their statutorily-conferred right of appeal; (2) the rehearing petition was the first and only time Petitioners had presented extensive and in-depth materials on Korean law; (3) denial of rehearing signifies that "appellate review" was not conducted; and (4) the Panel elected to rule diametrically opposite to the Korean Supreme Court's resolution of the time-bar issue as delineated in Petitioners' special appendices.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S ADJUDICATION OF THIS CASE IN VIOLATION OF 28 U.S.C. § 47 DEPRIVED PETITIONERS OF THEIR STATUTORY RIGHT OF APPEAL AND OF THE FUNDAMENTAL FAIRNESS REQUIRED BY THE DUE PROCESS CLAUSE

A. The Panel Violated 28 U.S.C. § 47 and Deprived Petitioners of Their Statutory Right of Appeal

As reflected in FRAP. 3, which is grounded in the Judiciary Act, 28 U.S.C. § 1291, the parties to a civil action may appeal as a "matter of right" from the judgment of the District Court as court of first instance. In accordance with 28 U.S.C. § 47 – which provides that "[n]o judge shall hear or determine an appeal from the decision of a case *or an issue* tried by him" – federal judges cannot decide appeals from cases or issues tried by them. Here, the Panel denied Petitioners their statutory right to have disinterested judges decide their appeal by (a) first deciding, *sua sponte*, the Korean time-bar issue, and (b) then denying rehearing without explanation, thereby affirming its own decision in violation of 28 U.S.C. § 47.

In sum, (1) the District Court did not address much less decide the Korean time-bar issue; (2) the Panel, foregoing remand, itself acted as the court of first instance by summarily deciding that issue; and (3) no independent appellate panel,

composed of disinterested judges not involved with initially deciding the Korean time-bar issue, has ever reviewed that decision.

As to the first two points, the Panel, after determining that the District Court should have applied Korean law, did not remand the action for a thorough examination of the contested issue of Korean time bar, as other panels have done in similar circumstances. *See, e.g., Carbotrade*, 99 F.3d at 86, and *Ferrostal, Inc. v. MV SEA PHOENIX*, 447 F.3d 212 (3d Cir. 2006). Instead, the Panel, *sua sponte*, applied what it believed to be Korean time-bar law to summarily dismiss the action. The Korean-time bar issue, however, had not been decided by the District Court and it had not been an issue on appeal since it was not any part of the District Court judgment under review.

As to the third point, and far worse, when Petitioners petitioned for rehearing and demonstrated that the Korean Supreme Court, in seven consecutive decisions over 27 years, had resolved this very time-bar issue in accordance with Petitioners' submissions delineating Korean law, the Panel denied rehearing without explanation.[8] Doing so effectively affirmed the Panel's own decision on the time-bar issue, thereby violating 28 U.S.C. § 47 and depriving Petitioners of their statutory right to have disinterested judges decide

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8. See footnote 7. Hyundai, in responding to the rehearing petition, advanced the flawed contention that Petitioners had waived the right to contest time-bar under Korean law because they had not submitted materials on that issue. The contention fails because: (1) Hyundai neglected to designate time-bar as an issue while raising eight other ones; (2) appellees (Petitioners) are not obliged to designate issues on appeal; and (3) Petitioners submitted a declaration from Korean attorney Byung Suk Chung (App. E) and alerted the Panel to its existence in a post-hearing letter requested by the Panel. (App. D)

whether the Panel's initial Korean time-bar ruling was correct. Moreover, by denying Rehearing, the Panel deprived Petitioners of their statutorily-granted right of appeal.

The short of the matter is that the Panel improperly acted as court of first instance by summarily deciding the disputed Korean time-bar issue and then as appellate judges by prohibitedly reviewing their own decision by denying rehearing without explanation.

Certiorari is necessary because only this Court can step in to guarantee Petitioners the disinterested appeal that the Judiciary Act, FRAP. 3, 28 U.S.C. § 47, and fundamental fairness demands, either by reviewing the Korean time-bar issue on the merits or by remanding the action to the Court of Appeals with appropriate directions consistent with Petitioners' statutory and due process rights.

B. The Panel's Handling of This Matter Lacked the Fundamental Fairness Required by the Due Process Clause

The Due Process Clause requires that if the legislature has created a statutory right of appeal, that appeal must be conducted in accordance with principles of fundamental fairness. *Evitts v. Lacey*, 469 U.S. 387 (1985); *Griffin v. Illinois*, 351 U.S. 12 (1956). The manner in which the Panel conducted this appeal was fundamentally unfair and deprived Petitioners of due process. The problem is two-fold. The Panel first decided the time-bar issue on a woefully incomplete record without notice to the parties. It then worsened matters by disregarding 28 U.S.C. § 47 and denying rehearing in an unexplained one-sentence order.

The Panel, in its capacity as *de facto* court of first instance, violated another due process safeguard of fundamental fairness by failing to write a reasoned opinion

with citations to appropriate Korean authorities explaining why Petitioners' claims were time-barred under Korean law. Admittedly, appellate court panels are not obliged to write opinions when disposing of a case. But that rule arose in the context of panels acting *as courts of appeals* – not as *courts of first instance*. Indeed, Chief Justice Brown for the Fifth Circuit cautioned that an appellate court should refrain from writing a well-reasoned opinion only after careful consideration because a written opinion is a vital safeguard of fundamental fairness:

> A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, *and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the power of almost final review.* The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law – and particularly Judge-made law – grows.[9] (Emphasis supplied)

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9. *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F.2d 966, 972 (5th Cir. 1970). Similar thoughts are expressed in the treatise, Carrington, D. Meador, M. Rosenberg, JUSTICE ON APPEAL (1976) at pp. 8-10. where the authors, in discussing due process issues in connection with an appeal, list as "process imperatives" the need for the appellate judges to "inform themselves fully on... the law on which decisions are to be made; and announce their reasons for decisions," explaining that (1) the latter imperative serves as an "essential demonstration that the court did in fact fix its mind on the

(Cont'd)

Judges of first instance are more likely to reach erroneous results than reviewing appellate judges because the issues are more finely honed the second time around on appeal as counsel and judges have additional opportunity to fully explore the legal issues. Conversely, an appellate court, precisely because it has the benefit of the trial court's written opinion, has a distinct advantage over the court of first instance which must start from scratch. The instant case underscores the importance of reasoned opinions. Here, the Panel was caught in the very snare that the *N.L.R.B.* (*National Labor Relations Board*) case inveighs against, falling prey to the tendency to an "ill-considered or even arbitrary" decision that nullified controlling Korean law.

The fact the Panel allowed the parties to submit extensive materials on Korean law *after* Petitioners had requested rehearing makes no difference when the Panel by denying rehearing effectively affirmed its own time-bar decision as a court of first instance. What is more, *rehearing* is not a *de facto* appeal. The factors leading a court of appeals to decide whether or not to grant rehearing differ markedly from those determining the merits on rehearing. Here, the reasons why the Panel denied rehearing are wholly unknown. What is known is that the Panel should not have acted both as court of first instance and judges reviewing their own decision and that the Panel should not have disregarded the controlling Korean law authorities holding that Petitioners' claims are not time-barred.

(Cont'd)

case at hand," (2) "an unreasoned decision ... is difficult or impossible to accept as an act reflecting systematic application of legal principles," and (3) "the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome... issues which their normal instincts would otherwise cause them to avoid."

II. By Disregarding Controlling Korean Supreme Court Decisions the Panel Failed to Follow United States Supreme Court Decisions Controlling Application of Another State's Law

A. The Panel's Blatant Nullification of Korean Law Warrants Review

Supreme Court review of federal appellate court decisions addressing issues of foreign law is required whenever a lower court has disregarded and thereby nullified the foreign law selected as having the most significant relationship to the case. As noted in *Leavitt v. Jane L.*, 518 U.S. 137 (1996), while this Court ordinarily does not grant certiorari to review decisions involving solely state law issues,[10] it has an obligation to do so when federal-court "nullification" has transpired:

> We have summarily set aside unsupportable judgments involving only individual claims... Much more is that appropriate when what is at issue is the total invalidation of a state-wide law... To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so ... and undoubtedly **should do so** where the alternative is allowing **blatant federal-court nullification** of state law.[11]

As recognized in *Leavitt*, Supreme Court review of blatant federal-court nullification of governing substantive

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10. *Leavitt* was a diversity case thus requiring the lower court under the *Erie-West* rule to choose the governing substantive law and then faithfully apply it. That principle, of course, is equally applicable when the lower court chooses foreign law.

11. 518 U.S. at 144-45. (Citations omitted; emphasis supplied)

rules of law – whether federal law, *Erie-West* selected state law or *Lauritzen-Romero* selected foreign law – is vital to the integrity of the American legal system.

In *Leavitt* this Court also dispelled any suggestion that a Second Circuit panel is better poised than the Supreme Court to decide a Korean-law issue:

> Our general presumption that courts of appeals correctly decide questions of state law reflects a judgment as to the utility of reviewing them in most cases, ... not a belief that courts of appeals have some natural advantage in this domain...[12] **That general presumption is obviously inapplicable where the court of appeals' state-law ruling is plainly wrong**.... (emphasis supplied).

Courts of appeals certainly have no "natural advantage" especially when the appellate panel is composed of judges who are not residents of the state or foreign country whose law is being applied. As observed in *Leavitt*:

> Finally, the dissent's appeal to the supposed greater expertise of courts of appeals regarding state law is particularly weak (if not indeed counterindicative) where a Court of Appeals panel consisting of judges from Oklahoma, Colorado, and Kansas has reversed the District Court of Utah on a point of Utah law.[13]

Leavitt emphasizes the vital importance of reviewing federal appellate court decisions that disregard the law those courts are obliged faithfully to apply, especially when the

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12. Citations omitted; emphasis supplied. 518 U.S. at 145.

13. 518 U.S. at 145

disregarded rule of law has widespread effect, such as a tort statute of limitations. In responding to the dissent's plea for Supreme Court restraint when asked to review federal appellate court decisions involving state law, the *Leavitt* majority stated: "[B]ut it is an odd notion of judicial restraint that would compel us to cast a blind eye on overreaching by lower federal courts."[14]

Like the facts in *Leavitt*, the Panel decision here presents this Court with an "extraordinary case worth [its] effort of summary review" because the Second Circuit's "[Korean] law ruling is plainly wrong," and "not sustainable." 518 U.S. at 145-46. The Panel nullified a controlling Korean statute of limitation by rewriting the triggering event from "damage" to "negligent act."[15] The Panel did so without even referring to any Korean Supreme Court decisions or providing any analysis whatsoever of Korean law in its opinion.

The Panel's refusal to acknowledge the manner in which the Korean Supreme Court, Korea's highest court, applies its country's time-bar law is so complete that it denied Petitioners' rehearing petition in a single word "DENIED," without explanation. In one stroke of the pen, the Panel obliterated nearly three decades of Korean Supreme Court precedent. And so we are left with the anomalous, indeed bizarre, result that Petitioners would have prevailed on the time-bar issue had a Korean court applied Art. 766(2), but have lost when a United States Court did so.

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14. *Id.* at 145. Judicial restraint undoubtedly underlies the principle articulated in Supreme Court Rule 10(c) informing the Bar that misapplying state law rarely serves as a basis for review. *Leavitt*, however, teaches that restraint is not appropriate when an appellate court blatantly nullifies the law.

15. See text at page 20 *infra* and note 22.

Supreme Court review of blatant federal-court nullification of governing substantive rules of law, whether federal law, *Erie-West* selected state law or *Lauritzen-Romero* selected foreign law, is, as recognized in *Leavitt*, vital to the integrity of the American legal system. Ours is a country of laws. Our judges solemnly swear to uphold and apply the law. If federal Courts of Appeals blatantly disregard the law, we cease to be a country of laws. The very foundation of our legal system – and its integrity – is undermined. Once the infection of disregard resulting in blatant nullification is left unchecked, the public will lose confidence in the Judicial Branch. This is not mere rhetoric. If the Supreme Court allows just a single instance of blatant disregard of law to go uncorrected, the signal is sent. Slowly but surely, as the rains erode the mountains, the integrity of our legal system will collapse as one court after another rules however it sees fit. The process may take years or even decades but it will take place, perhaps transparently but more likely imperceptibly, until momentum is gained and legal chaos sets in.

B. The Panel Blatantly Ignored and Nullified Korean Law

The Panel's decision to apply Korean law devoted a solitary sentence of text and a single footnote to the determination that Petitioners' suit was time-barred:

> Because Korean law bars the Petitioners and NOE from recovery against Hyundai due to statutes of repose, we reverse the District Court's finding of liability.[16]

The footnote quoted unofficial English translations of two Korean statutes of limitation – Art. 7 of the Korean Products Liability Act (2000) and Art. 766(2) of the Korean Civil Code.

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16. 426 F.3d at 588. Appendix "B."

No Korean cases were cited. No analysis or explanation was provided.

The English translations of both statutes quoted in the Panel's footnote raise glaring red flags signaling that something was amiss. The first red flag consists of the fact that Korea's Products Liability Act is dated 2000 – three years after the MSC CARLA casualty. The Panel, rather than applying a post-dated statute, should have investigated whether the statute was retroactive. The Panel neglected to do so and instead erroneously declared an $80 million case time-barred on the basis of a statute inapplicable on its face. The second red flag consists of the fact that the translation of Art. 766(2) supplied by Hyundai identified "unlawful act" as the trigger for its 10-year limitation, a term not ordinarily applicable to a defendant's acts or omissions in a negligence-based tort action.[17] Terms such as "negligent act", "wrongful act" or "intentional act" normally are used in the context of a negligence action.

Even if the Panel assumed that the English phrase "unlawful act" means "wrongful act," its members disregarded a third red flag. The phrase "wrongful act" does not necessarily signify when the negligent act transpired but instead can signify when the negligent act became unlawful by causing the damage.[18] The Panel was required to determine the intent of the Korean legislature by consulting Korean

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17. "Unlawful act" usually describes criminal acts or violations of statutes regulating conduct. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (RICO violation); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003)(American Disabilities Act); *Meyer v. Holley*, 537 U.S. 280 (2003)(Civil Rights Act); *U.S. v. Jimenez Recio*, 537 U.S. 270 (2003)(conspiracy).

18. See introductory notes to Chapter 7, Topic 1 of Restatement (Second) of the Law of Conflicts at p. 412.

Supreme Court decisions and Korean law experts and, pursuant to the Advisory Committee Notes to FRCP 44.1, by seeking input from counsel. But the Panel wholly failed to do so.

The Panel disregarded those red warning flags. Instead, as a *de facto* court of first instance, it dismissed the case without citing any decisions (Korean or otherwise), offering any textual analysis of the Korean statutes, or affording Petitioners' counsel an opportunity to present Korean law materials. Fundament fairness sank to its nadir when the Panel, acting as court of appeals denied rehearing in one stroke of the pen, notwithstanding that the extensive Korean-law materials submitted by Petitioners when applying for rehearing demonstrated beyond doubt that:

1. The Korean Products Liability Act is not retroactive and thus is inapplicable. That statute was enacted on January 12, 2000 – three years after Petitioners' claims arose – and does not state or imply that it is retroactive. To the contrary, addendum (1) to the statute states, "This act shall enter into force on July 1, 2000," indicating prospective application. Not even Hyundai suggested that the Korean Products Liability Act was retroactive. In reaching the erroneous conclusion that the Korean Products Liability Act time-barred Petitioners' claims, the Panel ignored *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law"), and *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (A statute presumptively has only prospective effect).

2. This case is not time-barred. Commencing in 1979 and extending through 2004 the Korean Supreme Court in seven consecutive decisions consistently has held that the 10-year time-bar of Art. 766(2) commences to run only upon the manifestation of damage (the cargo damage occurring when the MSC CARLA

broke in half) and not when the negligent act occurred (Hyundai's faulty welds).[19] Indeed, in the *Woo Am Shopping Center* case, involving injuries sustained when a shopping center collapsed during a fire due to defective construction – a negligence case conceptually identical to the time-bar issue here – Korea's highest Court stated:

> In cases of a claim for damages based on tort, where a period of time has lapsed between the commission of the unlawful act and the materialization of the resulting damages, the "date when the unlawful act was committed," the triggering date for the statute of limitations, is when the potential damage, which had existed in an unmaterialized state, has actually materialized thereafter – in other words, the moment in time when the incurrence of damages becomes real.[20]

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19. Case no. 77 *Da* 1894 (Dec. 26, 1979); case no. 743 (July 26, 1974); case no. 78 *Da* 1192(Oct. 10, 1978); case no. 760 *Da* 2520 (Feb. 22, 1944); case no. 81 *Da* 1071 (Nov. 24, 1984); case no. 85 *Daka* 693 (Oct. 11, 1998); case 97 *Da* 36613 (May 18, 1998). Yune Dec. ¶ 11n.4 and 5 and ¶ 12 in Petitioners' Special App. to Petition for Rehearing; Yune Supp. Dec. ¶ 17 and 18 in Special App. to Petitioners' Reply to Hyundai's Opposition to Petition for Rehearing; Chung Supp. Dec. ¶ 9 (SPA-11) in Special App. to Petition for Rehearing. Until 1979 a split of opinion existed in Korean law as to what event triggered the 10-year limitation period in Art. 766 (2). One view was that the occurrence of the negligent act is the trigger – the "Tortious Act or Time of Commission Theory," which is the approach adopted by the Second Circuit. The opposite view was that manifestation of the damage giving rise to the claim is the trigger – the "Damage Theory". The Korean Supreme Court in these decisions selected the latter.

20. 97 *Da* 36613 (May 8, 1998), the translation of which is found in Ex. 1 (SPA-2-39) to Yune Supp. Dec. (SPA 2-15) from Special App. to the Reply to Hyundai's Opposition.

Woo Am is indistinguishable.[21] And the principles enunciated there establish that the 10-year period of Art. 766(2) commenced to run on November 27, 1997 when Petitioners' cargos became damaged as a result of the MCS CARLA's splitting in two.

3. The unofficial English translation of Art. 766(2) is grievously inaccurate; a proper translation does not use as the trigger the term "unlawful act" but rather the term "tort," a concept which, under the Korean Civil Code, consists of a negligent act causing damage.[22]

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21. Hyundai, in opposing the rehearing petition, introduced a declaration from former Korean Supreme Court Justice Park that attempted to distinguish *Woo Am* as well as a similar lower appellate court holding on the remarkably in apropos ground that in both the owner or occupants of a structure attempted to recover damages from the negligent builder, whereas here the cargo owners attempt to recover damages from the negligent builder. Park Dec. ¶ 15 of Ex. A of Hyundai's Supp. App. The distinction is so unfathomable as to be embarrassing – a cargo owner's property occupies a ship no less than a lessee's property occupies the leased premises. Equally remarkable, Justice Park, after acknowledging that since 1979 the Supreme Court has adhered to the Damage Theory on six other occasions, tried to circumvent the devastating impact of those decisions with the cavalierly dismissive statement that "just as academic views can change ... so can the case law. Likewise, such is the case with the Korean Supreme Court." The obvious flaw in that statement is that for 27 years the Korean Supreme Court's opinion has not changed – not to mention that Justice Park sat on the *Woo Am* panel and hence personally endorsed the Time of Damage Theory. Kim Dec. ¶ 8 at SPA 2-4.

22. The phrase "unlawful act" is an incorrect translation of the Korean word "*bul-beop-haeng-wi*" – the word used in the Korean text of Art. 766(2). *Bul-beop-haeng-wi* should have been translated as "tort." A"tort" is defined in Art. 750 of the Korean Civil Code,

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One conclusion is inescapable. The Panel, by disregarding these extensive Korean law materials, nullified Korean law, thereby undermining its decision to apply Korean law in the first place.

It is one thing for an appellate court, after making a concerted effort to research the foreign law it has selected, to ultimately misunderstand that law and, as a consequence, reach the wrong result. It is quite another for the court to disregard 27 years of precedent expressed in seven consecutive opinions of a foreign country's highest court, while relying on a demonstrably inaccurate English translation of a foreign statute to reach the opposite result. The Panel's treatment of Korean law is a quintessential example of the nullification *Leavitt* prohibits. As unacceptable as state law invalidation was in *Leavitt*, so too Korean law invalidation is impermissible here.

After conducting the requisite *Lauritzen-Romero* interest analysis, the Panel selected Korean law. Under *Erie* and *West*, a federal court, when applying another state's law, is bound

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(Cont'd)

which is entitled "Torts" (*bul-beop-haeng-wi*), as consisting of an "unlawful act" (in Korean "*wi-beop-haeng-wi*") that causes injury. The concept of a tort in the Korean Civil Code, as in American law, therefore, encompasses more than a mere isolated negligent or unlawful act but additionally requires damage, without which no tort (*bul-beop-haeng-wi*) can occur. The trigger for Art. 766(2), namely, a *bul-beop-haeng-wi*, therefore, is not an unlawful act, namely, a *wi-beop-haeng-wi*, but a tort, namely, an unlawful act plus damage. *Cremona v. R.S. Bacon Veneer Co.*, 433 F.3d 617, 621 (8th Cir. 2006); *Niehus v. Liberio*, 973 F.2d 526, 531-2 (7th Cir. 1992); *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000); *Black v. Acme Markets, Inc.*, 564 F.2d 681, 685 (5th Cir. 1977)

by the decisions of the selected state's Supreme Court. The *Erie-West* rule equally applies to the decisions of the foreign state law selected pursuant to the *Lauritzen-Romero* analysis. The Panel, however, completely disregarded controlling Korean Supreme Court decisions. Consequently, the Panel failed to follow four controlling Supreme Court decisions – *Lauritzen*, *Romero*, *Erie*, and *West*.

What is more, conflict of laws is a body of law designed to ensure that disputes between parties of different states or countries are resolved under the appropriate body of substantive law. The modern approach, followed in *Lauritzen* and *Romero*, is based on interest analysis as prescribed in Restatement (Second) of the Law of Conflicts § 6 – the substantive law of the country having the greatest interest and most significant relationship with the parties and the controversy should apply. *Lauritzen* instructs that choice of law is designed to achieve "stability and order" with due respect for "comity, reciprocity and long-range interest." 345 U.S. at 582.

Comment (d) to § 6 (2) of the Restatement (Second) of the Law of Conflicts[23] emphasizes that proper choice of law is vital to harmonious international relations:

> ***Needs of the interstate and international systems*** Probably the most important function of the choice-of-law rules is to make the interstate and international systems work well. **Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them.** In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. (Emphasis Supplied)

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23. See also comment b to section 145 (1) of the Restatement.

These very considerations were embraced in *Romero*:

> [W]e must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of legitimate concern of the international community.[24]

Implicit in the due process, international relations, comity, and reciprocity considerations inherent in interest analysis is the requirement that the court, having chosen the appropriate foreign law, must then correctly apply rather than disregard the chosen law. Without a mechanism for ensuring that the chosen law is correctly applied, the entire field of conflict of laws along with *Lauritzen* and *Romero* would be rendered meaningless.

Such a mechanism, however, does exist. A federal court exercising diversity jurisdiction, after selecting the appropriate substantive state law, must adhere to the decisions of the highest court of that state. As pronounced in *West*, when fashioning a corollary to the rule of *Erie*, "the highest court of the state is the final arbiter of what is state law" and when that highest court has spoken, "its pronouncement is to be accepted by federal courts as defining state law...." The goal of this rule is "to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts...." 311 U.S. at 236. Indeed, the federal court "is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some

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24. 358 U.S. at 383.

future litigation." *Id.* at 238. This controlling principle, as the Second Circuit is fully aware, is necessary to maintain the integrity of our legal system. See *Plummer v. Lederle Laboratories*, 819 F. 2d 349, 355 (2d Cir. 1987), *cert. denied*, 484 U.S. 898 (1987); *Belmac Hygiene, Inc. v. Belmac Corporation*, 121 F. 3d 835, 840 (2d Cir. 1997).

The situation is no different when a federal court, deciding an international dispute, concludes that foreign law applies. And for precisely the same reasons that an *Erie-West* court is bound by controlling decisions of the chosen state's highest court, a *Lauritzen-Romero* court is obliged to recognize that the highest court of the selected foreign country is the final arbiter of its country's laws and that its pronouncements must be accepted and applied. Otherwise the lower court is merely paying lip service to *Lauritzen* and *Romero*.[25] Under *Lauritzen*, *Romero*, *Erie*, and *West* a federal court may not apply a different rule unless the rule of foreign law is contrary to United States public policy. Yet that is precisely what the Panel has done.

The bottom line is that the Panel reached a result diametrically opposite to the Korean Supreme Court's handling of the very same time-bar issue by disregarding seven Korean Supreme Court decisions unanimously holding that Art. 766(2) is triggered by *manifestation of damage* and **not** by *commission of the negligent act.* Indeed, the Panel's decision creates the prohibited situation in which two divergent and conflicting systems of Korean law have been

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25. In *Vimar Seguros y Reaseguros, S.A. M/V Sky Reefer*, 515 U.S. 528, 539 (1995), the court, upon referring the case to arbitration in Japan noted that if the Japanese tribunal did not correctly apply United States law this Court retained jurisdiction to overturn that maverick decision. By the same token this Court should overturn the Panel's aberrant application of Korean Law.

created – one applicable when time bar is addressed by a Korean court and quite another when addressed by a Second Circuit panel.[26] Yet, by virtue of Supreme Court fiat in *Lauritzen*, *Romero*, *Erie*, and *West*, the Panel must accept and apply those seven decisions.[27]

C. Supreme Court Rule C Warrants Review

The instant case is analogous to the situation described in Supreme Court Rule 10(c). The analogy arises in the sense that, pursuant to Rule 10(c), one of the compelling reasons for this Court to review an appellate decision occurs when "a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court." In the present case the Panel, after deciding to apply Korean law, failed to decide the matter in accordance with the very law it selected even though it was duty-bound under *Erie-West* to act as a surrogate Korean court. Inasmuch as the Panel's interpretation of Korean law is "irreconcilable with [the Korean Supreme Court's] own

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26. Counsel for Korean manufacturers with potential tort liability should flock to New York to file declaratory judgment actions so that the Second Circuit's maverick rule of Korean law can be applied to time bar all claims where the negligent act occurred more than ten years ago.

27. Indeed, this Panel should have heeded the holding in *Belmac* where the Second Circuit, after acknowledging that the lower federal court "must follow the law directed by the Supreme Court of the state whose law is found applicable," reversed the District Court because it "went its own way in restating Florida law." 121 F. 3d at 841. *Belmac* admonished the District Court for following "so-called refinements" to a Florida Supreme Court decision adopted by lower Florida courts, observing that "it is not our prerogative to do so" inasmuch as "the highest court of the state is the final arbiter of what is state law". 121 F. 3d at 840.

statement on the subject," this petition for writ of certiorari should be granted and the Panel's dismissal reversed.[28]

III. The Panel Wrongly Dismissed NOE'S Indemnity Claim on the Basis of New York Law

NOE filed its third party complaint against Hyundai approximately two years after having settled with and paid the Cargo Interests. The panel, in its Order and Opinion (App. B), held in footnote 2 that NOE's indemnity claim against Hyundai was barred under New York's "settlor bar rule," which provides that a co-defendant who is sued in tort may not recover contribution or indemnity from a co-tortfeasor after having settled with the claimants.

New York's settlor bar rule is a substantive statute that only governs claims subject to New York substantive law. *See* New York Gen. Oblig. Law Sec. 15-108; *Bankers Trust Co. v. Lee Keeling & Associates, Inc.*, 20 F.3d 1092, 1095-99 (10th Cir. 1994) (applying N.Y.Gen. Oblig. Sec. 15-108 only after conducting a choice of law analysis and determining that New York law applied); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 677 F. Supp. 151, 153 n.3 (S.D.N.Y. 1988) ("The parties to this motion do not dispute that New York law, and thus N.Y. Gen. Oblig. Sec. 15-108, applies in this action").

Putting aside NOE's contention that the New York settlor bar rule did not apply in this case because the underlying claims by the Cargo Interests against NOE were based on bill-of-lading contracts, and not in tort, the Panel ignored the fact that it had concluded that Korean law was the applicable substantive law in this case. Therefore, New York's settlor bar rule was inapplicable to NOE's indemnity claim.

In its petition for rehearing, NOE provided a declaration from an expert on Korean law, which was never contested

28. 518 U.S. at 138.

by Hyundai, informing the Panel that Korea did not have any law similar to the settlor bar rule of New York (Appendix F ¶ 13). Moreover, the Korean expert declared that under Art. 766 of Korean law, indemnity actions are subject to a 10-year time bar period that begins only when the right to indemnity arises- in this matter when NOE settled with Cargo Interests (See Appendix F ¶ 13).

The Panel ignored its own prescription for Korean law when it resolved to NOE's indemnity claim. And the Panel denied rehearing even though all of the evidence on Korean law provided to the Panel, which was not contested, established that NOE had a valid and timely indemnity claim against Hyundai. A clear error on the law, uncontested by the opposition, is properly within the Court's power to reverse.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue. The decision of the Court of Appeals should either be reversed on the merits or vacated with directions to the Court of Appeals to ensure that the Korean time-bar and settlor bar rule issues are properly adjudicated and the parties' statutory rights of appeal are fully protected.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 17, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: January 4, 2005 Decided: October 17, 2005)

Docket Nos. 04-4267-cv, 04-5572-cv(L), 04-6028-cv(CON)

RATIONIS ENTERPRISES INC. OF PANAMA, MEDITERRANEAN SHIPPING CO., S.A. OF GENEVA,

Counter-Defendant-Appellee,

NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION,

Consolidated-Plaintiff-Appellee,

v.

HYUNDAI MIPO DOCKYARD CO., LTD.,

Third-Party-Defendant-Appellant,

HYUNDAI CORPORATION,

Consolidated-Plaintiff-Appellant.

Appendix A

B.D. PARKER *Circuit Judge*:

Hyundai Corporation and Hyundai Mipo Dockyard appeal a judgment, entered following a trial to the United States District Court for the Southern District of New York (Owen, *J.*) arising from the loss of the containership *MSC Carla.* They advance a number of contentions, but we do not reach most of them since we conclude that one—that Korean law applies and precludes liability—is dispositive.[1]

BACKGROUND

I. The Lengthening

The evidence at trial established that the containership MSC Carla (originally called the Nihon) was built in 1972 in Sweden. A Swedish firm, Brostrom Shipping Co. Ltd. ("Brostrom"), initially managed the ship, sailing it under the Swedish flag. Brostrom used the classification society Lloyd's Register ("Lloyd's") (an international risk management organization providing underwriters and merchants with information on the condition of vessels) to develop specifications to lengthen the vessel by adding a fifteen-meter midsection to provide an extra cargo hold. After receiving bids from several shipyards, Brostrom contracted with Hyundai Mipo Dockyard in Korea (collectively with Hyundai Corporation, "Hyundai") to do the work. Brostrom and Hyundai agreed English law would govern the work.

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1. Hyundai Corporation and Hyundai Mipo Dockyard also appeal an anti-suit injunction prohibiting their participation in parallel litigation in Korea. Because we conclude they are not liable under the applicable Korean law, we vacate the anti-suit injunction as moot.

Appendix A

Hyundai manufactured the midsection to Lloyd's specifications prior to the *Nihon's* arrival in Korea in September 1984. Just as a midsection is welded into a bisected car to construct a limousine, the *Nihon* was elongated. Lloyd's inspectors observed the process. The welded joints attaching the inserted midsection were visually inspected, as well as subjected to extensive radiographic tests.

In May 1985, seven months after the ship resumed sailing, Lloyd's discovered a fatigue crack and conducted ultrasonic testing of the welds. The ship returned to Korea. Hyundai furnished Lloyd's with a report of certain defects in the welds and offered to repair them. Lloyd's determined the repairs were unnecessary, but marked the *Nihon's* record with a "condition of class" to ensure that the welds would continue to be monitored. After subsequent surveys finding no defect, Lloyd's reduced the condition of class. After 1985, Hyundai had no further involvement with the vessel.

II. MSC's Purchase

The ship was sold four times before being purchased in 1995 by a Panamanian company, Mediterranean Shipping Co., S.A. ("MSC"), and subsequently was renamed the *MSC Carla.* MSC purchased the *Nihon* in 1995 "as is." Prior to the purchase, a Lloyd's inspector imposed three conditions of class due to cracks in the starboard tank and corrosion in the starboard and port tanks. A Lloyd's work list called for new steel in several areas. In 1995, and then again in 1996, MSC requested postponements of the repairs and Lloyd's agreed. It is unclear whether the repairs were performed.

Nevertheless, in 1997, during a twenty-five year inspection of the ship, the conditions of class were removed.

III. The Casualty Voyage

The *MSC Carla* departed France for the United States in November 1997. The containership was filled with cargo and there is conflicting evidence as to whether it was loaded properly. There were several storms in the North Atlantic, and it is also debated by the parties whether the *MSC Carla* might have been able to avoid them entirely. This sort of weather is usual for the season and containerships similar to the *MSC Carla* normally handle this weather without incident.

During the voyage, water began splashing over the deck, possibly seeping into the boat's front hatches. All three engines cut. One restarted. As the boat climbed a large wave, the captain testified that the ship "hogged," with the front and aft sections sagging below the middle. The captain heard a breaking noise carry through the length of the hull and he noticed the bow light abnormally low.

The ship broke along the weld lines. The crew was soon airlifted to safety. Six days later the buoyant, dry aft section was towed to Las Palmas, Canary Islands, where it was inspected and its cargo salvaged. The flooded front section sank.

Appendix A

IV. Procedural History

Rationis and MSC, the ship's owner and operator, respectively, filed a limitation of liability proceeding in the Southern District of New York. The almost one thousand receivers of lost cargo (collectively, the "cargo interests") brought third-party complaints against Hyundai based on the allegedly defective lengthening work. Rationis and MSC's liability insurer, North of England Protecting and Indemnity Association ("NOE"), settled with the cargo interests in 2000 for $16.95 million. (NOE also settled with various cargo interests separately.) NOE joined the action against Hyundai, to recover the amounts paid in the settlement.

In the pre-trial proceedings before the District Court, Hyundai argued, among other things, that the District Court lacked personal jurisdiction. Hyundai then commenced, in a Korean court, two declaratory judgments to establish non-liability. (The first action named and served three cargo interests and the second action named, but never served, most of the other nearly one thousand cargo interests). The District Court then issued an anti-suit injunction, requiring Hyundai to request a suspension of the Korean action. Hyundai requested the suspension, but appealed the injunction, arguing again that the District Court lacked personal jurisdiction.

We vacated and remanded the anti-suit injunction, directing the District Court to conduct an evidentiary hearing as to whether the Court had personal jurisdiction over *Hyundai. Rationis v. AEP/Borden Indus.*, 261 F.3d 264 (2d Cir.2001). We also directed the District Court, should it issue

an anti-suit injunction, to heed *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir.1987) and its progeny since it had failed to conduct such an analysis before initially enjoining Hyundai.

On remand, the District Court conducted an evidentiary hearing on personal jurisdiction and concluded that it had jurisdiction. Hyundai subsequently moved for summary judgment, arguing, in part, that the plaintiffs could not prevail under the laws of either Korea, Sweden or Panama, the universe of jurisdictions whose laws potentially applied. The Court denied the motion, concluding that Hyundai had waived its choice of law defense by failing to select a particular foreign law until the summary judgment stage. The Court stressed that, although Hyundai had announced as early as their answer to the complaint that the "substantive law of a foreign country governs," they had delayed through four years of litigation, until after the completion of discovery, before precisely identifying the applicable foreign law. *In Re Rationis Enters., Inc. of Panama*, 2003 WL 203210, *1 (S.D.N.Y.2003). The District Court reasoned that this alternative pleading style failed to provide the opposing party with the notice required by Fed. R. of Civ. Proc. 44.1.[2] The Court concluded that Hyundai's overly expansive formulation of foreign law prejudiced the plaintiffs. Finding waiver, the

2. Fed. R. of Civ. Proc. 44.1 provides: "A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rule of Evidence. The court's determination shall be treated as a ruling on a question of law."

Court saw no need to conduct a choice of law analysis and proceeded to apply United States law.

The District Court held a bifurcated bench trial. There Hyundai continued to maintain that it did not waive the choice of law argument and United States law did not apply. The major factual disputes centered on whether the deck broke first as a result of the allegedly faulty welding, or whether the allegedly corroded bottom collapsed first, as a result of MSC's failure to maintain the ship. The parties also disagreed as to whether the lengthening contract was for the sale of goods or the provision of services, only the first of which implicates products liability doctrines. Hyundai, as a nominal party to the contract, contended that the District Court lacked personal jurisdiction and that NOE's claims were barred under a contribution of settling parties theories. Following trial, the District Court found Hyundai liable in negligence and strict liability. Hyundai appeals, raising a host of issues. We reach only one—the choice of foreign law—because we conclude it is dispositive. We reverse.

DISCUSSION

I. Standard of Review

The parties dispute the standard of review applicable to the District Court's choice of foreign law ruling. Hyundai takes the position that all choice of law determinations, including the one presently before us, are questions of law to be reviewed *de novo*. NOE and the cargo interests maintain that, because the district court did not undertake a choice of

law analysis, we should review for abuse of discretion the district court's determination that the defense was waived.

The District Court's determination regarding what constitutes "reasonable . . . notice" under Rule 44.1 and waiver of the foreign law issue falls within the discretionary powers of the District Court to supervise litigation. Therefore, we agree with NOE and the cargo interests that those threshold determinations should be reviewed for abuse of discretion. *See Pierce v. Underwood*, 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (explaining that matters of discretion should be reviewed for "abuse of discretion"). As the Ninth Circuit has explained, "[b]ecause Rule 44.1 grants the district court discretion in determining 'reasonable' notice, we review the district court's application of this standard for abuse of discretion." *DP Aviation v. Smiths Indus. Aerospace & Defense Sys., Ltd.*, 268 F.3d 829, 846 (9th Cir.2001). However, once we move beyond the issue of "reasonable notice," we will review any determinations concerning the appropriate choice of law *de novo*. *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir.1998).

II. Pleading Alternative Bodies of Law

Before we conduct the choice of law analysis, we must resolve whether Hyundai waived the foreign law argument by simultaneously pleading the applicability of English, Swedish, Korean, or Panamanian law, and not settling conclusively on one body of foreign law. We must determine whether the District Court's determination that Hyundai waived this argument was proper. We now clarify that alternative theories may well suffice as reasonable notice

when, as here, relevant events occurred in multiple foreign locations and legitimately point to several different applicable bodies of law. We therefore find that the parties gave proper Rule 44.1 notice and the applicability of foreign law was not waived. We hold that the District Court's decision that notice was not proper and that therefore Hyundai waived the foreign choice of law argument exceeded its discretion.

Congress passed Rule 44.1 in 1966 to avoid unfair surprise, to make uniform the permissibility of raising an issue of foreign law after pleadings where the choice of law issue became apparent later, and to put to rest the notion that foreign law is a question of fact that must be proved at trial and reviewed on appeal only for clear error. While the Rule requires that the parties give notice of the intent to raise foreign law, the Advisory Committee's Notes make clear that Congress deliberately declined to provide "any definite limit on the party's time for giving the notice of an issue of foreign law." Fed. R. Civ. P. 44.1 advisory committee's note, 39 F.R.D. 69, 118 (1966). Congress explained: "The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice." *Id.*

It is important to acknowledge that notice under Rule 44.1 differs from argument—notice merely called attention to the fact that the issue will be raised, whereas argument lays out, *inter alia*, the provisions of foreign law, the basis for its relevance, and the application of the foreign law to

the facts of the case. Indeed, the Advisory Committee distinguished between notice and "presentation of material on the foreign law." *Id.* According to a prominent treatise, "[t]he function of the notice is not to spell out the precise contents of foreign law but rather to inform the court and litigants that it is relevant to the lawsuit. Thus a high degree of specificity is not required." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2443, (2d ed.1994). Accordingly, a litigant must provide the opposing party with reasonable notice that an argument will be raised, but the litigant need not flesh out its full argument at the Rule 44.1 stage. In a maritime mass tort such as the case before us, the choice of law analysis is complex, as well as highly dependent on facts that may not be adduced until discovery has proceeded. Indeed, in international disputes involving parties of sundry allegiances, the eight-factor choice of law analysis discussed below is rarely well-managed by bright-line rules, uniform deadlines, or aggressive findings of waiver. Frequently, the proper determination of foreign law can be a complicated task. Rule 44.1 is intended to assist the court with its work and the court is, of course, free to enlist the parties in this effort. Ultimately, the responsibility for correctly identifying and applying foreign law rests with the court.

The question here is not whether Hyundai failed to give any notice, but rather, whether its alternative pleading offended Rule 44.1. Although this may force the opposing party to conduct further research, such additional work in a maritime mass tort is hardly the undue surprise Rule 44.1 seeks to prevent. Perhaps it is even to be expected, when shipping goods from Europe to the United States, on a

Swedish ship, modified in Korea, currently owned and operated by Panamanians. We therefore recognize alternative pleading of choice of law issues as satisfying the notice requirements of Rule 44.1. For these reasons, we find Hyundai's alternative notice reasonable under Rule 44.1 and that it is an abuse of the District Court's discretion to have held otherwise.

III. Choice of Law Analysis

Lauritzen v. Larsen, 345 U.S. 571, 583-92, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), directs us to consider seven factors in conducting a choice of law interest analysis. Adding another factor, the Supreme Court announced in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), that the *Lauritzen* factors are "not intended as exhaustive." We enumerated the *Lauritzen* factors in *Carbotrade S.P.A. v. Bureau Veritas*, 99 F.3d 86, 90 (2d Cir.1996): "(1) the place of the wrongful act; (2) the law of the ship's flag; (3) the domicile of the injured party; (4) the domicile of the shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations."

The law of the ship's flag at the time of the welding was Sweden, but at the time of the casualty was Panama. Generally, we look to the law of the ship's flag only if the shipowner is a party:

> Whatever significance law of the flag may have in cases where the ship or its owner is a party and where other factors fail to point clearly to another

> jurisdiction's law, we see no reason to apply the law of the flag here in preference to that of another jurisdiction whose ties are more pertinent to the dispute, especially given the fact that neither the ship nor the owner is a party.

Carbotrade, 99 F.3d at 92-93. Here, Brostrom, the shipowner at the time of the welding, is not a party and Rationis, the shipowner at the time of the casualty, is also not a party, having settled without asserting claims against Hyundai. We therefore do not consider the law of the flag a determinative factor. For the same reasons, the shipowner's base of operations is not a determinative factor here. Another non-determinative factor is the place of the contract as this case arises in tort, not contract.[3] *See Carbotrade*, 99 F.3d at 91

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3. The District Court explained, after finding liability on the basis of strict liability and negligence theories, that "these claims arise not in tort but in contract on the basis of bills of lading issued to the cargo interests." *In re: Rationis Enters., Inc. of Panama*, 325 F.Supp.2d 318, 328-29 (S.D.N.Y.2004). The Court stated this as an explanation for the inapplicability of the Settlor Bar Rule. This is error because products liability sounds in tort. *Cf. International Ore & Fertilizer Corp. v. SGS Control*, 38 F.3d 1279, 1284 (2d Cir.1994); *see also East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) (distinguishing between strict liability claims in tort and warranty claims in contract).

Appellees also argue that the claims were brought in contract under the Carriage of Goods by Sea Act ("COGSA"), 46 App. U.S.C.A. § 1304. This is not the case under Second Circuit law. Indeed, we have explicitly held that a COGSA claim may be a "mixed tort, contract and bailment cause of action." *Texport Oil Co. v. M/V*

(Cont'd)

("[N]o direct contractual relationship exists between the plaintiff and the defendant, so the fifth factor—the place of the contract—is not involved in our analysis."). Inaccessibility of a foreign forum also is not relevant, because a New York court is fully capable of applying foreign law in this case. *See Lauritzen*, 345 U.S. at 590, 73 S.Ct. 921 ("There is not the slightest showing that to obtain any relief to which [they are] entitled under [foreign] law would require [their] presence in [a foreign forum] or necessitate [their] leaving New York."). Finally, this Court has considered the law of the forum generally of little relevance in United States courts. *Carbotrade*, 99 F.3d at 91 ("[T]he seventh *Lauritzen* factor—the law of the forum—is irrelevant here because this litigation is in the courts of the United States.").

(Cont'd)

Amolyntos, 11 F.3d 361, 367 (2d Cir.1993) (citation and internal quotation marks omitted), *overruled on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). The Fourth, Fifth, Ninth, and Eleventh Circuits have similarly held. *See Oriente Commercial, Inc. v. American Flag Vessel*, 529 F.2d 221, 223 (4th Cir.1975); *Associated Metals & Minerals Corp. v. Alexander's Unity MV*, 41 F.3d 1007, 1013-14 (5th Cir.1995); *All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425, 430 (9th Cir.1989) (holding that "[i]f [a contracting party] breached its duty of care with respect to [another party to the contract] then that breach of duty can give rise to tort liability irrespective of contract obligations between the parties."); *Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co.*, 215 F.3d 1217 (11th Cir.2000). As the Eleventh Circuit further explained, "COGSA affords one cause of action for lost or damaged goods which, depending on the underlying circumstances, may sound louder in either contract or tort." *Polo Ralph Lauren*, 215 F.3d at 1221.

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The place of the alleged wrongful act that gave rise to the liability is Korea, where the welding was performed. The cargo interests contend that the place of the wrongful act is the location of the casualty, that is, the Atlantic Ocean. But we have held that the place of the wrongful act is not where the vessel sinks, but where the negligence occurs. *See Carbotrade*, 99 F.3d at 91. The reason for this rule is not difficult to discern because it is the state where the negligence occurs that has the greatest interest in regulating the behavior of the parties. *See Curley*, 153 F.3d at 15 (focusing on the location of the tort and choosing Mexican law, because Mexico has the greatest interest in regulating the behavior of the parties).

The citizenship of the injured parties factor is complicated by incomplete discovery. A good portion of the cargo interests are United States citizens and a good portion are European, but the precise breakdown is disputed. It is clear that the citizenship of NOE, the insurer with the greatest share of the claims and also the insurer for the shipowner and ship operator, is the United Kingdom. Furthermore, the destination of the lost cargo does not dictate the governing body of law; according to *Lauritzen*, a nation has a compelling interest in protecting its nationals, not its imports. *Lauritzen*, 345 U.S. at 586, 73 S.Ct. 921. It is simply too variable and indeterminate to ground the choice of law analysis in the intended destination of the lost cargo. Even from the sparse record as to the cargo interests' countries of citizenship, this factor steers toward "much of the globe." *Carbotrade*, 99 F.3d at 90 (internal citation omitted).

The citizenship of the defendants, Hyundai, is Korea. The presence of Hyundai Mipo Dockyard's counsel and the affairs Hyundai Corporation conducts with United States businesses, while critical to a personal jurisdiction analysis, does not help determine the applicable body of law because those affairs are wholly unconnected to the events giving rise to the casualty. "The presence of an office of a defendant in a particular country might not always be sufficient to tip this factor in favor of applying the law of that country." *Carbotrade*, 99 F.3d at 91-92 (giving weight to the location of the defendant's office only because that office gave rise to the dispute). The citizenship of the defendants points without question to Korean law.

Taking these factors together, we find Korean law applies. The allegiance of the injured parties does not point conclusively to United States law, because a significant portion of the injured parties are European. Even if we were to consider the allegiance of some of the cargo interests as favoring United States law to some degree, this is balanced by the allegiance of the defendants, which strongly favors Korean law. Ultimately, it is the place of the alleged wrongful act that tips the scale in favor of Korean law, for Korea, with its extensive shipbuilding business, possesses the greatest interest and responsibility in regulating the industry. *See Curley*, 153 F.3d at 15. Because Korean law bars the cargo interests and NOE from recovery against Hyundai due to statutes of repose, we reverse the District Court's finding of liability.[4]

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4. "The right to claim for damages resulting from an unlawful act shall lapse by prescription . . . if ten years have elapsed from the

(Cont'd)

Appendix A

CONCLUSION

For the foregoing reasons, we reverse the judgment of the District Court, vacate the anti-litigation injunction as moot and remand with instructions to enter judgment in favor of Appellants.

(Cont'd)
time when the unlawful act was committed." Korean Civil Act, No. 6591, Ch. V, Art. 766 (2002) (S.Korea). "The right for damages under [the Product Liability Act] shall be exercised within 10 years from the date on which a manufacturer supplies a product causing damage." Product Liability Act, No. 6109, Art. 7. (2000) (S.Korea).

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 9, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 9052 (RO)

In the Matter of the Complaint of:

RATIONIS ENTERPRISES, INC. OF PANAMA, as Owner, and MEDITERRANEAN SHIPPING CO. S.A. OF GENEVA, as Bareboat Charterer

of the *MSC Carla* for Exoneration from or Limitation of Liability.

OPINION AND ORDER

OWEN, *District Judge*:

On November 24, 1997, the *MSC Carla*, a fully-loaded 900 foot containership, was on a voyage from LeHavre to Boston following a recent month-long dry-docking with a "Special 25 Year" Survey by Lloyd's Register at which time over 100 men did a lot of work on the vessel and Lloyds' issued a clean certificate of class.

The first days of the voyage were uneventful. The *Carla* had loaded cargo at various ports such as Hamburg, Bremerhaven and left LeHavre for Boston on November 21. The vessel was properly loaded and its stability was

satisfactory. Captain Giuseppe Siviero, an experienced master, described the *Carla* as being in good to optimum condition. On November 24, however, weather conditions began deteriorating and wind speed increased steadily until by 4 o'clock that afternoon wind from the west reached force 10 or 11 on the Beaufort Scale, approximately 55 to 72 miles per hour, with wave heights of 11 to 12 meters. The vessel's heading was 250 degrees with seas coming at its starboard bow at an approximately 20 to 40 degree angle and swells from a previous storm coming at its port bow from a southwesterly direction. Thus, approaching from different directions, the storm waves were confused. At 6 o'clock, the vessel suddenly rolled heavily—about 25 degrees—several times and then steadied somewhat. These several rolls, in addition to tossing and breaking all the dishes in the crew dining room, caused all three engines—the major center one and two side engines—to stop running because of lack of oil pressure. The engineer was shortly able to get the center engine going and the *Carla* continued on its 250 degree course but at minimal speed.

Shortly after regaining power on its central engine, the *Carla* encountered the first of at least two large, steep waves. Captain Siviero (through an interpreter) testified as to what happed thereafter:

Q. Now what happens after 1830 hours?

* * *

A. Well, of course the first thing we did was we tried to put a little bit of order because of everything

having been thrown all over the place, and to try to put the situation, the conditions was they were prior to that incident of rolling. And of course the engineer below was trying to get the two side engines started again. As we were adjusting and increasing the pitch, of course we were gaining a little bit more speed. . . . six maybe seven knots, because it's only one engine. We started climbing a wave, and you could see that the bow light kept coming up and up and up and up, and I could see that the ship was going up this wave.

Q. And then what happened?

A. So I was trying to judge how big this wave was by the inclination of the ship, and I noticed that the bow light was lower than where one would expect it to be in relationship to the pitch of the ship. (Tr. 122-23).

* * *

Then as we started going down the other side of this wave, . . . the ship made a very strange motion as if it had wanted to screw itself into the wave . . . I heard a very sharp hit, impact, and of course the noise had been carried through the hull, but a very sharp staccato noise, and then going up this second wave, and I noticed that there was something absolutely wrong. As a matter of fact my first officer, I noticed that the bow was going down. The ship was going up, the bow was going down, and the first officer was saying we've broken apart, we've broken apart

and I was able to see. I immediately ran out to the wing on the observation wing and what I noticed is that this part, the bow was actually separating itself to port, away from the rest of the ship. And we broke apart. (Tr. 123-24).

* * *

Q. When did it break?

A. On the first wave. Here is hogging started, to crack here. When it go down, the big shock break, go up again, split. (Tr. 130).

* * *

Q. What happened after that?

A. The wave passed, the impact passed also, went away, of course. When we went—so, there was the impact. The impact stopped. The wave passed over us[1] but we started going up that wave and that's when the ship broke. That's when it separated, split. (Tr. 129).

* * *

Q. In your opinion, captain, based on being up on the bridge on November 24th at approximately 1830 hours, at what point did the ship begin to break in

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1. The captain testified elsewhere that ["Heavy spraying reached right up to the glass of the cabin."]

half in events, over the series of waves that he has just talked about?

A. I would say that the ship started breaking apart on top of the first wave. . . . That's when I believe that the cracking started.

Q. Captain, exactly why do you think it cracked at that particular moment, at the top of the first wave?

A. Because we saw that the bow light had started to lower itself relative to the position where it should have been, and the line of containers, the surface of containers was not in line with the containers aft of them. They had shifted as though they had shifted position, because they were lower. (Tr. 124).

* * *

The hull of the *Carla* broke apart roughly in a complete circle at or just in front of the welding at the back of a 15 meter elongation section defendant Hyundai Corporation ("HC"), had built and inserted in its mid section in front of the bridge some 13 years earlier. The front half of the vessel moved to port and fortunately the captain was able to turn the stern half of the vessel (with the rudders) to starboard and thus avoided hitting the separated forebody. The front half, over 5 days, slowly filled up with water and sank. The stern half was towed to Los Palmas Island, the cargo unloaded, then towed to Gijon, Spain, where it was scrapped.

Going back those 13 years to February 20, 1984, HC, involved in the ship building services, entered into a ship

elongation contract with the then-owner of the vessel, Brostrom Shipping Co., Ltd., under which HC, identified as the "contractor," undertook to lengthen the NIHON, as the *Carla* was then named, by adding approximately 15 meters length in its middle in accordance with its plans and specifications annexed to the contract. Bostrom was to pay HC some $2,000,000 for the work with liquidated damages under the contract of $25,000/a day for failure to deliver the vessel by the 25th day delivery date.

HC obtained the builders' risk insurance. HC did not perform the work but delegated it to its shipyard, specifically Hyundai Mipo Dockyard ("HMD"). HMD fabricated the new midbody section in its shipyard in Ulsan, Korea. It cut the vessel in half, put in the new midbody which was then joined by welding to the old aftbody and forebody. In addition to the work on the NIHON, HMD was more or less simultaneously doing three other lengthening projects for the group of which Brostrom was a member, and as to one, the M/V JUTLANDIA, HMD's work on that vessel overlapped with its work on the NIHON by approximately twenty days. Consequently, from the trial testimony, it appears that the many labor demands on HMD were causing the JUTLANDIA to be nine days behind delivery schedule and the NIHON (now named Carla) three days behind schedule. To avoid or minimize liquidated damages under the contract, HMD contracted with quite a number of outside welders to supplement HMD's welding staff but their quality, as I conclude here, had disastrous consequences thirteen years later.

Appendix B

Six months after the NIHON's delivery, it was discovered that all 76 butt welds to the doubler straps on the deck of the *Carla* were deficient and HMD acknowledged to officials at Lloyd's Register in early June of 1985 that the outside welders brought in had done a poor job. The doubler straps referred to, three on each side of the deck for much of its length, to be made continuous, were to be welded between each section with what is called *full* penetration welds. This requirement, imposed by Lloyd's Register, was to provide adequate deck strength especially across the newly-installed midsection. Normally, it appears HMD's welders did their work in the shop which would have made it easy to do a two-sided transverse butt weld bottom to top. Instead, here, HMD elected to install the doublers plate by plate onto the deck. As a result, the welders not being able to come up from the underside, failed to do "full penetration welds" which obviously markedly weakened the straps which were there to strengthen the deck while the vessel would be bending and turning in waves.[2] It also appears that for the 60 HMD

2. At some point, during the warranty period, this problem soon came to light in an inspection in Pusan. As an HMD witness Man Jin Yoon testified:

Q. What did you conclude from that inspection report?

A. Well, that inspection report does say that there are lack of penetration and some slag inclusion.

Q. What's slag inclusion?

A. Slag is a kind of unnecessary material inside the welding. . . . (Tr. 1674).

(Cont'd)

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(Cont'd)

This problem, which was communicated somewhat to the shipowner, was apparently not emphasized, and was indeed played down and not followed-up by HMD.

THE COURT: Mr. Yoon, I don't know anything about building ships so you will forgive me for putting this question to you this way. But when you have a report of lack of penetration and slag inclusion do you think of that in terms of it being something that could put the ship at some risk of damage? Are you troubled when you see that?

THE WITNESS: That's purely depends on the size or quantity.

THE COURT: In this case you get a report that these two things exist. Does that make you say, uh-oh, we got a problem on our hands here?

THE WITNESS: My personal, no, sir.

THE COURT: No. OK. Because then if you said we did, and you tell the owner this is what we got and the owner doesn't come back to you, you then might be saying to yourself, hey, owner, we called this to your attention and you got to pay some attention to it.

Do you feel a duty on yourself to follow up and say why aren't you doing anything?

THE WITNESS: Well, as far as I know this matter has been discussed even before we are at Pusan inspection. So I believe they have some deep discussion between owners and Lloyd's as professional organizations and we waited until they come up to us.

THE COURT: But they don't come up to you. So at some point you say well, if it doesn't bother them it's not going to bother us either, right?

(Cont'd)

welders Lloyd's Register had only one hull surveyor present and he did not have the ability to observe every weld. One of HMD's top vice-presidents acknowledged that HMD's quality assurance department did not radiograph all of the welds to ensure they were of good quality. Instead it appears HMD decided to only perform random radiographic inspections which did not catch a number of faulty welds. How many were missed and unexplained is not clear. This, in addition to the new doubler joints not being staggered relative to the joints of the plates of old body part, made it even weaker (*see, infra*).

Also, a substantial number of design and construction flaws were concentrated in a relatively small area. The most significant of these was a cavity of an undetermined number of inches in length and irregular in shape where there should have been solid welding where the deck and the starboard topside joined at the rear of the inserted section. This should never have existed. And not only did the cavity increase the stresses in that area but welding irregularities—high and low points of welding material inside the cavity—also created additional points of stress.[3]

(Cont'd)

THE WITNESS: Yes, at that time personal I was not as work as project manager and I left this project and returned to my original position.

THE COURT: So you really don't know the answer to what I am asking?

THE WITNESS: No, sir. (Tr. 1676-78).

3. There was no such cavity left on the port side.

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Next there was a 7 mm gap from a misalignment of a sheer strake plate and the deck plate at one point. This misalignment was purportedly compensated for by the welders filling the gap with welding material but which, according to engineering testimony in fact *increased* stresses at that point. Further, as mentioned above, in a number of places there was a failure to have the doubler welds "bridge" the erection joint weld. In homely terms, this is like a bricklayer building a brick wall by putting one brick one exactly on top of another without alternating the bricks. In some cases there was insufficient beveling on the deck plate, meaning the HMD workers beveled at a 25 degree angle from the vertical where drawings specified 45 degrees, which made it impossible for welders thereafter to fully insert a welding tool into the crevice for a full penetration weld. Many butt welds also contained ~~slag which~~ weakened their ability to bear loads that they were designed to carry.

Joseph Winer testified as an expert for the plaintiffs' interests and was personally involved in supervising the lengthening of a number of vessels over the years. He went aboard the *Carla's* aft section the moment it was towed to Los Palmas immediately after the break-up in December 1997 and visited it later four times over a one year period in Gijon, Spain. He concluded that quality assurance was lacking and that the inspection practices and procedures were inferior which permitted defective welds to go uncorrected. He faulted HMD's planning, particularly as to the design and construction of the deck doublers.

Winer, after being very specific about the defects in the workmanship by HMD's welders, testified that from the

observations and measurements he made aboard the vessel the ship failed on deck, and the fracture ran around the perimeter of the vessel's hull. He testified:

Q. Which of those two occurred first, crack in the starboard torsion box structure or failure at the bottom?

A. The crack in the starboard torsion box structure.

* * *

Because the crack under my conclusion traveled from the box girder, the torsion box down the side of the ship until it reached that heavy structure which extends up from the bottom of the ship to five meters above. That's coincidental with the turn of the bilge. And looking at Exhibit 126A, the five meter above baseline is precisely where the heave structure starts. As we can see over the side, all the heavy structure is over here. The heavy structure goes up to this point here. So the fracture traveled easily down between the transverse frames. But when it got to this point it stopped, and I guess the initial hinging point was the entire lower structure. And then that separated and not in one motion but I think in several episodes the crushing of these lower port and starboard bilge regions occurred and occurred, and the final hinging caused the tank top to fracture in tension and the ultimate hinge with the separation of the hull at the bottom of frame P. (Tr. 774-75).

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Winer also testified, confirming the break at the deck, that the pivoting was at the bottom at the tank top plate; since across the bottom it was "folded down and broken . . ." whereas if the break had occurred at the bottom, it would have been "shoved under".

Dr. Charles Cushing, another expert witness for plaintiffs with a substantial background in naval architecture and marine engineering including supervising more than twenty conversions of ships by lengthening, personally examined the rear section of the *Carla* at Las Palmas and Gijon. He testified:

> So what we have at the outboard edge of the erection butt—where the two ships, the new midbody and the old forebody were attached—is an arrangement represented by this diagram that shows the fillet weld, a massive amount of welding as we show in the photograph, a massive amount of welding that extends over to the region and connects up with the heat-affected zones of the fillet welds.
>
> And then of course, the concentrations that we have discussed so many times in the last—yes, the cavity. And then the stress concentrations that are also caused by the defective welding that include undercut, overlap, excessive crown, all of these are stress concentrations.
>
> And, in addition to that, because of the size of this particular weldment— and it's pretty

massive—taking the doubler at the top, the deck and the side, this is a lot of concentrated welding that creates residual stresses.

When you, as you described earlier, your Honor, melt the steel and melt the electrodes to get them to bond together, and then they cool, in the cooling process they create a lot of internal stresses. Those are called residual stresses. And this whole corner where you have very heavy welding builds up these residual stresses. And there is no way of knowing the quantity of those stresses, but it's known that it's a high amount.

Added to those residual stresses are the normal longitudinal bending stresses that a ship experiences that are in the deck and in the doubler. There are transverse stresses. The ship is twisting. There are torsional stresses, and there are shear stresses in the ship. So this corner, with all of these concentrations, are expected to carry all of these different stresses, not only the longitudinal but the other ones.

And then finally, in this particular corner, because of the massive amount of material in there you have what are called triaxial stresses. (Tr. 963-64).

* * *

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From personal observation Cushing stated:

A. Well, I think that the most powerful evidence in the case is obviously the appearance of the fractured end of the ship. First the appearance of the vessel across the deck and down the sides, this somewhat clean break in the ship.

The next would be that when the ship was on the beach in Gijon, the appearance of the bottom of the ship with the crushing that existed down at this hinge but very localized, the absence of this crushing damage in the open area between the two wing tanks, in the cargo hold there was an absence of crushing except for some cell guides which were I think—which I think can easily be explained by the fact that there were nearly 100 containers in that hold, each of them weighing anywhere up to 20 tons, collapsing.

Q. In making that statement, are you relying on the visual evidence seen in Plaintiff's Exhibit 213-1?

A. Yes, sir.

Q. Go on please. I'm sorry.

A. And then of course, the absence of what could be the characteristic of wrinkling or crushing along the sides of the ship in the various photos on the stern end, and then there were salvor's photos that are available that also show a lack of this crushing or

wrinkling up the side of the ship on the forebody. (Tr. 987-88).

Cushing concluded:

And then of course as you work your way around, there were very obvious defects as shown in this macro photograph of overlaps and excessive crowns which are all stress risers. The massive amount of welding is a stress riser.

But the thing that was to me the most interesting about this corner here is that this is one of the crucial corners on the ship. You don't play around with the top of the sheer stake. That's the source of fracture on so many ships, is problems occurring in this connection and in this corner.

THE COURT: How does that happen? Why is it?

THE WITNESS: Well, this is supposed to be, if I can mark this, this is supposed to be right out to the side like this.

THE COURT: I understand. Why if you fill it up with welding material does it become one of the weakest places in the vessel?

THE WITNESS: Because there was an obvious misfit of this plate. What happens in shipyards—

THE COURT: Where is this weakness conveyed to the vessel because of that?

THE WITNESS: Because in this area, in this whole area is welding that should have been roll plate of homogenous characteristic, but instead somebody's in there filling and filing and filling adding a lot of residual stress.

THE COURT: But you say this has caused a lot of problems on a lot of vessels and where does it start breaking a lot of vessels?

THE WITNESS: Right here. (Tr. 933-34).

* * *

THE WITNESS: If somebody welds something onto here and leaves a stress concentration all the Liberty ships—I shouldn't say all, many of the Liberty ships and the T2 tankers during World War II, that was a contributing factor. They had problems here.

THE COURT: What kind of problem, pick up the weld?

THE WITNESS: Because it is such a constrained and stressed area, if you had a stress concentration to what is already a constrained area it triggers the fracture.

THE COURT: I understand, doctor—where does the fracture occur? . . .

THE WITNESS: It occurs usually where the defect is. If the defect is in the weld here, it will start there. If you have a sharp corner at the top it will start there. But it is right wherever the defect is and the concentration is.

THE COURT: I'm sorry—I'm not, I can see from what I have heard from the witnesses so far that if you have bending and twisting of the vessel and there's a hole that's going to cause all kinds of problems around that hole.

THE WITNESS: Yes, sir. (Tr. 935).

Dr. Cushing concluded clearly that the welding defects of HMD added residual stresses to the starboard sheer strake and deck area, and that these "welding defects" were enough when added to other normal stresses so as to cause the ship to break in half:

THE WITNESS: Because the process of welding adds residual stress that could be as high as 50 to 80 percent of the yield of the material. You are locking in very high stress. You only have to add another 20 percent to the ship before it leaves the shipyard in order to have it yield. So by putting massive amount of welding up here you are putting residual stresses in there that stay there, and those stresses are locked in.

THE COURT: When it breaks where does it break?

THE WITNESS: For wherever you put the additional problem, the additional stress concentration, such as a tip in the cavity would be stress concentration. Or these excessive crowns or some of the other welding defects are enough to add to all of these other things to cause it to fracture. (Tr. 936).

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Plaintiffs' metallurgist, Dr. John E. Slater, testified as follows:

Q. Dr. Slater, were there any other defects or flaws that you observed?

A. Yes, there were, Mr. Olson. And this if you like is a sort of package. What I have discussed previously is the fact that there was a lack of penetration in the doublers that led to fatigue cracking in the doublers.

Now, if you look at the fracture as it runs across the vessel on the starboard side we note that the deck fracture specifically in the weld area, which is shown in 228B, is very close to the fatigue fractures that occurred in the doublers. In other words, what we have is a very close juxtaposition between the doubler butt weld and the deck butt weld.

Now, when we start looking at the deck butt weld in this failure area which extends a significant distance in this fracture we note that the weld itself has failed in a low ductility manner, in quite a brittle appearing manner, and that the fracture is associated with the heat effected zone of the weld.

Now, this is an undesirable situation. When you put a weld in a component you do not want any type of fracture or anything else to occur actually in the weld or the weld heat affected zone.

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In fact, when a weld procedure is written it is typical for a tensile test to be performed right across the weld through inter-bas metal and you want the fracture to occur in the base metal.

And the fact that we have here a problem with the weld which is allowing a fracture in a low ductility manner through the weld heat affected zone in my opinion is a significant problem here because it clearly is a plane of weakness the structure.

What I am trying to say is we sort of got a level of three situations here. We have, first of all, the doublers that have a lack of penetration; we have the doublers that failed by fatigue; the doubler weld, which has now fatigued is very close to the deck plate weld which itself has a defect in it from the viewpoint of fracturing in the weld heat affected zone.

So what you really have is this sort of unholy trinity if you like of three situations occurring: Bad welding in the doublers leading to fatigue, juxtaposition of the butt welds in the doublers, and the butt weld in the deck and failure of the deck probably due to stress transfer after the doublers have already failed in this weld heat affected zone. (Tr. 301-03).

Of confirmatory significance to all of the above were the existence along the break at the point where the starboard topside and the deck met (*see* p. 7, *supra*) of certain

"chevrons"—like private first-class chevrons—in the tear of the metal both leading up the topside to the hole and across the deck to the hole. A number of these chevrons not far apart from each other, both pointed at where the experts say the "brittle fractures initiated."

THE COURT: [interrogating Dr. Slater] You are in effect telling me that these chevrons are pointing and saying "he did it, he did it, he did it" right?

* * *

THE WITNESS: Yes. I'm saying that the chevrons are pointing to an area where those brittle fractures initiated.

THE COURT: Where it started?

THE WITNESS: Yes. (Tr. 318-19).

* * *

THE WITNESS: Well, we know that the chevrons point back towards the area where that brittle fracture in fact started. We know that this brittle fracture started on either side of this area which contains the weld cavity. (Tr. 321).

* * *

THE COURT: And that caused the chevrons?

THE WITNESS: And then the brittle fractures arose and the chevrons formed. Which is why I call the cavity and the

area around the cavity an initiating point for the fracture. (Tr. 322).

Even HC's metallurgist David Hughes acknowledged that a defect can cause a brittle fracture if the overloaded conditions are correct.

Given all the foregoing, I am completely satisfied by more than a fair preponderance of credible evidence that this vessel broke apart starting at the point of the negligently created cavity where the starboard topside and the deck met at the juncture between the back of the HC insert and the forward edge of the rear section of the vessel. The break then ran across the deck and down both topsides. This is not only based on the first hand observations of the captain, but on all the—for lack of a better overall term—metallurgical "evidence" that the fracture left behind, i.e., the hole, the chevrons pointing to the hole, and the absence of wrinkles or accordion pleats in the topsides, both starboard and port.[4]

Virtually none of these serious welding flaws were visible to anyone—neither metallurgist nor sailor—after the

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4. I note that even the Hyundai people in an early letter dated February 11, 1999, a senior design manager J.S. Kim stated: "Our opinion is that it is reasonable to think that the crack in the ship was initially on the upper part on the basis of above information and our checking the damaged structure."

I further note that this opinion was later backed away from because the obvious consequence of its validity was that Hyundai was liable under a number of theories of law for faulty construction of the insert to the vessel.

vessel left the Hyundai Dockyard in 1984. Obviously the hole in the starboard topside/deck joint was not visible. The absence of "full-penetration" welds in the deck doublers was not visible because the shortfall was below the joints and against the deck, and as to this, HMD had played it down. Then, there was duplicative and unnecessary welding filler and quality-damaging slag included in the welding material which was neither visible nor could it be discovered absent metallurgical testing, thus obviously not available to those in charge of operating the vessel. Accordingly this flawed lengthening insert met its grievously distressing end without any reason to anticipate it on the part of the owners, the captain, the mates or seamen, in which while a major storm—though not unusual—the vessel took a number of unexpected stresses of some very major rolling and climbing and falling in conflicting seas with a number of unusual waves.

The Hyundai defendants, relying mainly on computerized input from a "finite element analysis" assert the conclusion that the vessel failed first at the bottom. This is not only contrary to the captain's personal observations from the bridge, *see supra*[5] but, I conclude, had not taken sea

5. The Hyundai defendants, based on the captain's testimony that the bow light was still lit when the vessel was going up the second wave, contend that it was the *bottom* that had come apart first, for they contend that the wires to light the bow light run under the deck, not along the bottom. This, however comes nowhere near overcoming all the balance of the captain's testimony and the well-documented and photographed evidence of the hull condition thoroughly supporting the conclusion that the parting was at the deck first. And I conclude it is not at all unlikely that even if the light

(Cont'd)

conditions into consideration (*see* Tr. 1556) and completely disregards the absence of wrinkles, etc. I reject the Hyundai defendants' suggestions that the master's route was negligently inappropriate; that alleged flaws in the forward hatch covers were the cause of the eventual sinking of the bow;[6] or that the vessel's destruction was caused by its being overloaded.

Under the circumstances, the Hyundai defendants are liable to the plaintiffs and third-party plaintiffs on principles of strict liability flowing from § 402A & § 400 of the Restatement, (Second) of Torts and its successor of § 14 of the Restatement (Three) for the faulty manufacture and sale of the lengthening insert in 1984. At the outset, I conclude that the addition of the insert to the *Carla* was clearly a "sale"

(Cont'd)

went out after the first wave, the captain, who, in the nerve-wracking seconds as the vessel was coming apart, was still able to see the light fixture itself and with this vessel already broken and coming apart under his feet and before his eyes, could well have remembered the light as "on" even though as to this detail he was mistaken. Alternatively it is not at all unlikely that with a 900 foot long vessel there was enough slack in the wire in the sub-deck conduit to keep it intact though stretched—and the bow light lit—until the bow section broke loose and the stern was turned to starboard to avoid hitting it. There is even some question of whether indeed the bow light wire ran along the bottom or under the deck. There may be other explanations in that frantic minute or two—who knows what happened!

6. The split tearing open the bottom, it is entirely understandable that over five days enough water would get into the bow sections to sink it.

and not a repair. A repair generally is where something is broken and then is fixed. Here the contract was to manufacture a new elongation section of the vessel and place it in the vessel's middle. Nothing was broken or repaired and such ship elongation was within the normal and continuing course of the Hyundai business calling for the creation of a new section and its installation. Given this, it was built for sale by Hyundai and was placed in position and attached in the regular course of Hyundai business for a given contract price—a sale price. The failure to properly fabricate the installment to this section is within this doctrine. Hyundai Corporation and its Hyundai Nipo Dockyard had a duty to use reasonable care in designing and manufacturing the product to enable it to avoid foreseeable risk of injury. *Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 758 N.Y.S.2d 271, 788 N.E.2d 620 (2003). The design and manufacturing defects cited above were such that in foreseeable normal use, even though a number of years later, the Hyundai defendants' workmanship would fail with the obvious risk of damage to the vessel and its cargo. *See Sears Roebuck and Co. v. American President Lines, Ltd.*, 345 F.Supp. 395 (N.D. Cal.1971).

The Hyundai defendants suggest that the plaintiffs' warranty claims fail for lack of privity, but whatever else, that is not the law in admiralty cases. *See Todd Shipyards Corp. v. Turbine Service, Inc.*, 467 F.Supp. 1257 (E.D.La.1978); *In re American Export Lines, Inc.*, 620 F.Supp. 490 (S.D.N.Y.1985). All that the cargo interest must show and the Court here has so found:[7]

---

7. The real tragedy here is that the flaws in the design and manufacturer were not visible until the vessel broke apart because of their hidden existence.

> (1) that the product was defectively designed or manufactured; (2) that the defect existed when the manufacturer delivered it to the purchaser or user; (3) that the defect is a proximate cause of the accident.

See American Export Lines, Inc., 620 F.Supp. 490, 517 (S.D.N.Y.1985), and *Cigna Property and Casualty Insurance Co. v. Bayliner Marine, Corp.*, 1995 WL 125386 (S.D.N.Y. 1995) to identical effect.

The Hyundai defendants are also liable in negligence on the established facts above, *see Sears Roebuck and Co. v. American President Lines, Ltd.*, 345 F.Supp. 395, 399 (N.D.Cal.1971).

In defense they assert that the cargo interest claims, to the extent that there have been insurance settlements, are barred by a New York principle called the Settlor Bar Rule which provides in part that: "[a] a tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." NY Gen. Oblig. Law § 15-108(c). This is however inapplicable here for these claims arise not in tort but in contract on the basis of bills of lading issued to the cargo interests. In addition, these claims have already been ruled on adversely during the course of the trial and are therefore no longer before me.

Next, notwithstanding the Hyundai defendants' claims, the North of England's (NOE) Indemnity Claims are proper. This argument is not only premature, for damage issues have not yet been tried, but the principle applicable here is

articulated in *Atlantic Richfield Co. v. Interstate*, 784 F.2d 106, 113 (2d Cir.1986) *cert. denied* 479 U.S. 817, 107 S.Ct. 75, 93 L.Ed.2d 31 (1986). The necessary showing being only that of "potential liability", NOE's indemnity action meets this requirement.

I decline to consider the Hyundai interests reraising the claim of lack of personal jurisdiction of the NOE complaint, for in the well-over-a-year since that complaint was filed in May 2002 and the briefing here, the Hyundai interests have filed and argued a summary judgment motion and participated in a thirteen day trial before the Court without raising the jurisdictional issue. I find this to be a waiver of this defense, particularly against the background of their waffling on the New York City telephone company listing.

Finally, the Hyundai Corporation endeavors to separate itself from tort liability on the ground that it had "no role to play in performing or controlling any of the work done under the conversion contract," asserting as to it the mere existence of a nominal contract status.

This argument fails because HC is a "manufacturer" and "seller" under products liability law regardless of whether the action is in strict liability or negligence making HC's assertion of exculpatory minimal "contractual status" irrelevant. Further, plaintiffs are proceeding against HMD and HC under a theory of products liability based on (a) strict liability and (b) negligence which is:

> One engaged in the business of selling or otherwise distributing products who sells or

> distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the products manufacturer.

But, in addition, undisputedly established on this record, HC is the party named in the construction contract as the "contractor" and was the recipient of the agreed-upon price for the work. HC was the party obliged to pay liquidated damages if required, and was required to maintain builders' risk insurance. HC was the party designated in the letter of commitment and in the refund guarantee. Moreover, aside from the contract, HC listed itself as the "exporter of record" on the export declaration. HC held out the elongated vessel as a product which HC manufactured and sold. Accordingly, under the Restatement, HC is a manufacturer and seller for the purposes of plaintiff's and third party plaintiffs' claims.

Accordingly, all parties are directed to appear before me on July 26, 2004 at 3:30 p.m. in Courtroom 1106 to schedule the next steps to the hearing of damage issues against the Hyundai defendants.

The foregoing constitutes the Court's findings of fact and conclusions of law and is So Ordered.

Dated: New York, NY
July 9, 2004

s/ [illegible]
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 27, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Date:	2/27/06
Docket Number:	04-4267-cv
Short Title:	Rationis Enterprises v.
DC Docket Number:	97-cv-9052
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Richard Owen

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 27th day of February two thousand six.

Present:

Hon. RALPH K. WINTER,

Hon. SONIA SOTOMAYOR,

Hon. BARRINGTON D. PARKER,

CIRCUIT JUDGES,

04-4267-cv

In re: RATIONIS ENTERPRISES, INC.

A petition for panel rehearing having been filed herein by the Appellees North of England and the Cargo Interests,

Appendix C

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

For the Court,
Roseann B. MacKechnie, Clerk
By: s/ Arthur Heller
Motion Staff Attorney

APPENDIX D — LETTER FROM MACHALE A. MILLER OF MILLER & WILLIAMSON LLC TO CLERKS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 19, 2005

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January 19, 2005

Via Telefax: 212-857-8578 and U.S. Mail

Ms. Roseann B. MacKechine
Ms. Tammy Martinez
Clerk of Court
United States Second Circuit Court of Appeals
Thurgood Marshall United States Courthouse
40 Centre Street
New York, New York 10007

Re: *Rationis Enterprises, Inc. of Panama et al. v. Hyundai Mipo Dockyard Co., Ltd., et al.*
Docket No. 04-4267-ev
Date of Oral Argument: January 4, 2005
Our File: 98-001

Appendix D

Dear Ms. McKechine and Ms. Martinez:

On January 11, 2005 Weil, Gotshal & Manges replied to Mr. DeOrchis' letter to you of January 10. In that letter counsel for appellants inaccurately present the law relating to the significance of a CIF sale in identifying the victim in a tort claim arising out of damage to property. Also, in their January 9 letter, responding to the court's inquiries of January 5, counsel for appellants present additional thoughts regarding the *Lauritzen* analysis in the process emphasizing unimportant factors. We write to respond to appellants' misstatements and to provide additional authorities in response to the courts' questions during oral argument.

1. Appellants point out that a sale on CIF terms addresses risk of loss and that transfer of title depends on the terms of the sale contracts. The statement is only partially correct. As a general rule, whenever the sale of goods is on a CIF basis, title and risk of loss transfer from seller to buyer at the latest upon delivery of the goods to the carrier. *Madeirense Do Brasil S.A. v. Stulman-Emrick Lumber Co.*, 147 F.2d 399, 402 (2d Cir. 1945); *Alaska Russian Salmon Caviar Co. v. M/V MARIT MAERSK*, 2000 A.M.C. 2297, 2000 WL 145124 (S.D. N.Y.); *Farbwerke Hoeshst A.G. v. M/V DON NICKY*, 589 F.2d 795, 797 (5th Cir. 1979); *York-Shipley, Inc. v. Atlantic Mutual Ins. Co.*, 474 F.2d 8, 9 (5th Cir. 1973); *William B. Branson, Ltd. v. Tropical Shipping & Construction Co.*, 598 F.Supp. 680, 681 (S. Fla. 1984). Title and risk of loss are separate and discrete concepts. The Uniform Commercial Code "practically pays no attention to title at all," the emphasis being on risk on loss. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE (4TH ED. 1995) § 5-1

at p. 249. As between buyer and seller, the party having risk of loss at the time of the loss is the party injured when the property becomes damaged or lost during shipment, and, as held in *Alaska Russian*, is the injured party entitled to sue. As set forth in Mr. DeOrchis' January 10 letter, 90.4% of the consignees (the CIF purchasers) have a U.S. base of operations. Accordingly, 90.4% of the victims are U.S. citizens with a U.S. base of operations, and the vast majority of the products lost or damaged aboard the MSC CARLA were destined for the U.S. for distribution into the stream of commerce here. Consequently, even though the accident and damage took place on the high seas, the injury in a real sense was felt in the U.S.[1]

2. Contrary to the admonition in *Rhoditis* (398 U.S. at 308), HMD uses a mechanistic approach to the *Lauritzen* analysis in the process overlooking, as recognized in *Carbotrade*, that *Lauritzen* adopts an interest analysis approach. *Carbotrade*, however, concluded that law of the flag is virtually irrelevant in a negligence suit by a time charterer against a classification society. The distinction is

1. Even though the purchasers/consignees were paid for these losses by their cargo underwriters, the fact remains that the purchasers/consignees were the victims. Their cargos were lost or damaged. They had to explain to their customers why the promised goods could not be delivered timely or at all. They endured the adverse impact on their business reputations of failing to deliver the cargos. Presumably that is why HMD/HC conceded in their brief that "the insurers' nationalities are of no import" in determining choice of law. For an analogous reason, a liability insurer, when included as a direct action defendant in a diversity suit, takes the citizenship of its insured for purposes of determining whether diversity jurisdiction is present.

conceptually sound. *Lauritzen* was a Jones Act suit by a seaman against his contractual employer, the shipowner. The relationship between the parties was a continuing one. The situation is quite different if a visitor from another state is injured on the vessel in that his domicile country has an interest in protecting its injured citizens who have no permanent relationship with the vessel that might create an equal or even overriding interest.

3. Choice of law can be difficult in some certain circumstances but need not be particularly difficult in a products liability case. Applying the "most significant relationship" test, espoused by the §§ 6(2) and 145 of the RESTATEMENT 2D CONFLICT OF LAWS, the domicile and base of operations of the victims of the torts of negligence and products liability create an overriding relationship and the controlling *Lauritzen* factor.

4. The jurisprudence recognizes that in a products liability suit the victim's domicile usually has the most significant relationship with the accident and greatest interest in it. See *Colon v. BIC USA, Inc.*, 199 F.Supp.2d 53 (S.D.N.Y. 2001), and *In re Air Crash Near Bombay*, 531 F. Supp. 1175 (W.D. Wash. 1982). *In re Air Crash Near Bombay* explicitly rejected the contention of the U.S. manufacturer defendants that U.S. law should apply because this country has an interest in insuring that products made here are manufactured properly. The interest of the victim's domicile, which focuses on protecting its injured domiciliaries, was regarded as paramount.

5. Other products liability decisions have adhered to that same principle. *Rutherford v. Goodyear Tire and Rubber Co.*, 943 F. Supp. 789 (W.D. Ky. 1996), the court applied the law of the victim's domicile to a products liability claim involving an Indiana victim injured in Indiana by the blowout of a tire manufactured in Ohio on an automobile assembled in Kentucky. In selecting the law of Indiana as the jurisdiction having "an overwhelming interest," the court noted that "the law of this forum [Kentucky] cannot merely always follow the products of Kentucky corporations wherever they may cause damage in other jurisdictions." So too Korean law cannot follow the products of HMD and HC. In *Custom Products, Inc. v. Fluor Daniel Canada, Inc.*, 262 F.Supp.2d 767 (W.D. Ky. 2003), the court applied the law of the victim's base of operations in a products liability case involving machinery manufactured in several states, shipped in part from Kentucky, sold by a corporation with its base of operations in Kentucky causing injury in Canada to a Canadian victim including negligent misrepresentation made in Kentucky. The court applied Canadian law in part because of the victim's domicile. In *Johnson v. Ford Motor Co.*, 2003 W.L. 22317425 (N.D. Ill. 2003), the court applied the law of the injured party's domicile in a products liability case having Illinois plaintiffs, a Michigan defendant and an accident in Kentucky involving a car manufactured by the defendant in Kentucky. In selecting Illinois law, the court stated, "It cannot be reasonably inferred that Ford chose to manufacture vehicles in Kentucky to obtain the benefit of Kentucky court laws." The court did apply Kentucky law relating to the failure to wear seatbelts because Kentucky has a strong interest in driver safety within its borders. In *Danielson v. National Supply Co.*, 2003 W.L. 22332982 (Mn. App. 2003),

the court again applied the substantive law of the injured victim's domicile. These decisions are grounded in the RESTATEMENT 2D CONFLICT OF LAWS and, in particular, §§ 6(2) and 145.[2]

7. When U.S. courts decide not to apply the law of the victim's domicile in a products liability case, the conflict analysis often revealed that the law of the victim's domicile did not allow recovery yet the law of the chosen forum did. Section 6(2)(c) lists as one factor "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue." Comment f notes that "it is fitting that the state whose interests are most deeply affected should have its local law applied," but goes on to observe that the "***content*** of the relevant local law . . . may be significant in determining whether this state is the state with the dominant interest." Comment f then makes clear that if the substantive law of the other interested state absolves the defendant from liability (as HMD/HC claim Korean law does),[3] that law should not be applied stating,

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2. Subparagraph d of § 6(2) lists as one relevant factor "the protection of justified expectations." Comment g notes that in negligence cases "the parties act without giving thought to the legal consequences of their conduct nor to the law that may be applied" so that "the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question."

3. The cargo interests take exception to HMD/HC's statement that Korean law defeats the cargo interests' claims. The affidavit of Kim & Chang, which accompanies the cargo interests' appellate brief replying to HMD/HC's motion to stay the anti-suit injunction, states

(Cont'd)

"application of the state's statute or common law rule which would absolve the defendant from liability could hardly be justified on the basis of this state's interest in the welfare of the injured plaintiff." *E.g.*, *Martin v. Goodyear Tire & Rubber Co.*, 61 P.3d 1196 (Wash. App. 2003), and *Stupak v. Hoffman-LaRoche, Inc.*, 315 F.Supp.2d 970 (E.D. Wis. 2003).

8. During oral argument, counsel for HMD/HC, in an attempt to create the impression that Sweden has a significant interest in this casualty, mechanistically invoked the law of the flag that, although flown when HMD/HC lengthened the vessel, had not been flown by that ship for well over a decade before the casualty. To bolster this irrelevant contact (see *Carbotrade*; this is not a Jones Act case) HMD/HC contend that the contract required Swedish approval and compliance with Swedish regulations citing A-183 and 967. At oral argument we recall that appellants' counsel emphasized the contractual reference to Swedish requirements. But the record does not support what HMD/HC represent. The cited record pages are from two provisions in the lengthening contract that merely state that "[d]rawings which have to be submitted to the governmental bodies, shall be sent to the OWNER

(Cont'd)

that Korea's ten year statute of limitations does not begin to run until the defect, which caused the injury, has become manifest. This suit, therefore, is timely. Moreover, Korea recognizes a cause of action for negligence as does the U.S. HMD/HC do not suggest that Korean negligence law differs from that of the U.S. Consequently, a false conflict exists as to negligence. Furthermore, Korea now recognizes a products liability cause of action so allowing U.S. products law to apply hardly can offend Korean legal philosophical sensibilities.

after approval by the relevant authority"and that "all trials required by National Authority Inspection to be carried out." But those provisions are nothing more than precautionary catchalls that kick in only if indeed the parties later discover that some governmental body (not necessarily Sweden) has a relevant requirement. Poignantly missing from the record is even so much as a suggestion that any such Swedish requirements existed, that any Swedish regulations were incorporated into the specifications, that Swedish officials inspected the vessel or that either HMD or HC were aware of any Swedish regulation. At trial HMD/HC called Bengt Olofsson, Brostrom's superintendent who attended the lengthening, and he said absolutely nothing about Swedish regulations or inspections. Tr. 1114-1153, A-650-55, A-1242-49.

9. Even if in 1984 any Swedish regulations applied, those contacts afford Sweden no significant interest in a casualty occurring 18 years later when Sweden had no connection with the operation, maintenance or repair of the vessel. Indeed, liability was not based on HMD's deviating from specifications. Instead the record is replete with reference to negligent construction by HMD as well as the dual failure of HMD to properly inspect its work in progress and of HC, as the contracting party, to ensure that HMD properly performed this project that created substantial danger if not conducted properly. Sweden, therefore, has only the most attenuated of contacts with this ship and none with this particular casualty which took place long after the vessel no longer flew the Swedish flag and which occurred without any discernible relationship to any Swedish regulations or inspection requirements.

10. HMD/HC urge application of Korean law because it is the law of the "place of the wrongful act." HMD/HC are wrong in their approach to this *Lauritzen* factor. The introductory notes to Chapter 7, Topic 1 of RESTATEMENT 2D CONFLICT OF LAWS at p. 412, state that the original Restatement selected the law of the "place of the wrong" for tort claims.[4] This term was defined in § 377 as "the state where the last event necessary to make the actor liable for an alleged tort takes place," which in turn was regarded as the "state where the injury occurred." In any event, in a products case any interest of the state where the defects were created is outweighed by the interest of the victims.

11. The victim's domicile is accorded considerable weight in a products liability case because of the qualitative nature of that state's relationship with the casualty. In the instant case the victims' domicile also carries considerable quantitative weight. As reflected in Mr. DeOrchis' letter of January 10, the consignees, who are the purchasers of the cargo and hence the actual victims, are overwhelmingly American – 572 consignees have a U.S. base of operations. Only 61 have a base elsewhere. Although domicile or base of operations is only one of the *Lauritzen* factors, the number of victims should figure into the equation so that this one factor must be given greater quantitative weight than other factors, such as HMD/HC's place of incorporation and

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4. It is unclear whether *Lauritzen* is referring to the place of the act or the place where that act causes harm thus becoming a wrongful act. Section 145(a) of the RESTATEMENT 2D lists both as factors along with the domiciles of the parties but always with reference back to § 6(2) with its focus on the most significant relationship – the victim's domicile in a products case.

principal place of business, that have only a single contact. Surely the base of operations of 572 victims should be accorded far greater weight than the base of operations of 2 defendants.

12. This conclusion is bolstered by the twofold consideration that (1) for the past 20 years HMD and HC have had a substantial base of operations in the U.S. with an office in New Jersey, a Manhattan telephone listing, $100,000,000 of sales, a $2,500 entertainment budget in the U.S., a $3,500/month travel budget in the U.S. and 13% of its revenues generated here (210 F.Supp.2d at 427-29); and (2) in the lengthening contract they eschewed Korean and Swedish law in favor of English and New York law.

Very truly yours,

MILLER & WILLIAMSON LLC

Machale A. Miller

MAM:swg
Enclosure
cc: All Counsel (*via telefax*)
(See attached list)

APPENDIX E — DECLARATION OF BYUNG-SUK CHUNG

I, Byung-Suk Chung, declare under the penalty of perjury under the laws of the United States of America that the following statements are true and correct to the best of my knowledge:

1. I am a partner and the head of the shipping practice group at the law firm of Kim & Chang, Seyang Building, 223 Naeja-dong, Chongro-ku, Seoul, Korea. I have been a member of the Korean bar since 1980. I hold an LLB degree from Seoul National University in Korea and an LL.M in Maritime Law from University College, University of London. I was also a visiting foreign lawyer for six months at the lawfirm of Haight, Gardner, Poor and Havens (now Holland and Knight) in New York. The details of my background and experience are set out in the attached *curriculum vitae*.

2. I represent 3 of the Cargo Interests, in the Matter of the Complaint of Rationis Enterprises Inc. of Panama, as Owner, and Mediterranean Shipping Co., S.A. of Geneva, as Bareboat Charterer of the M.V. "MSC Carla," Case. No. 97Civ. 9052 (RO) and related actions and third party actions against Hyundai Mipo Dockyard ("HMD") and Hyundai Corporation ("HC"), in their defence of the Declaratory Judgment Action filed by HMD (Case No. 98 Kahap 5087, "First Korean Proceeding") before the Ulsan District Court in Korea.

3. Under Korean law, if HMD voluntarily withdraws the First Ulsan Proceeding and the Cargo Interests do not object, the action will be concluded. This will allow HMD to effectively dismiss the action without involvement of the Ulsan District Court If the antisuit injunction presently held against HMD

is later vacated, HMD's withdrawal will not preclude HMD from filing a fresh new action at a later date.

4. It is not clear whether or not the Ulsan District Court will give *res judicata* effect to Judge Owen's decision on liability. In any event, the Ulsan District Court will net be bound by Judge Owen's decision but rather rely on the same as evidence, which the Ulsan District Court will consider together with the Other evidences put before it, in order to make its own decision.

5. Exhibit 1 to Cargo Interests' Opposition to Motion to Stay Pending Appeal of the Antisuit Injunctions against HMD and HC is a translated copy of a Brief that was submitted by HMD to the Ulsan District Court on September 25, 2004. Attached is at copy of the cover page of HMD's brief bearing the two rubber stamps of the court certifying that the brief was (i) submitted to the Ulsan District Court on September 25, 2004 and (ii) received by the document handling department on September 30, 2004.

6. At the October 1, 2004 hearing before the Ulsan District Court, the said Court was notified of Judge Owen's Order prohibiting HMD from participating in the First Korean Proceeding. The Ulsan District Court indicated that the Order was not binding on the Court.

7. There is no statute of limitations for declaratory judgment actions in Korea that would be applicable to HMD, since HMD is seeking a declaratory judgment that there is no liability on its part.

8. There has been no progress on the second Korean Proceeding (Case No. 99 Kahap 7196) instituted by HMD against ABC Carpet & Home and 1,002 other cargo interests ("Second Korean Proceeding") since filing of the Complaint by HMD, because HMD has not taken any steps to make service abroad on the parties named in the Complaint. The service has to be effected before proceedings can commence.

9. Regarding the First Korean Proceeding, although HMD initiated the declaratory judgment action seeking confirmation that there is no liability on its part, the defendants (that is, 3 of the Cargo Interests (claimants) in the New York proceedings) shall show that they have a claim against HMD. In order for the Ulsan District Court to review and reach a decision on the merits of the case, the filing of the Complaint must be followed by exchange of pleadings on the merits and detailed evidences, such as expert opinions, followed by hearings for witness (factual/expert) testimony on the existence of the defect and whether or not the liability for such defect is attributable to HMD.

10. However, as apparent from the submissions made by the defendants in the First Korean Proceeding, listed below, the details of the merits of the claim have not yet been addressed. The photographs in Exhibit 1 could only show the existence of the defect (but not the cause nor the liability for such defect) while Exhibits 2 and 3 are in essence to show the progress of the New York proceedings in support of the defendants' motion to seek an adjournment of the First Korean Proceeding, pending the New York proceedings.

Appendix E

a) Exhibits 1-1 through 7	Photographs of the cracks and the void spaces showing the welding defects
b) Exhibit 2	Transcript of Kyung-Soo Lee (an employee of HMD)
c) Exhibit 3	Deposition Plan

11. In sum, there has in essence been no substantial progress on the merits of the case in the First Korean Proceeding while the Complaint for the Second Korean Proceeding has not yet even been served on the defendants. Therefore, both of the Korean proceedings are nowhere near completion.

12. I have the following comments on the Declaration of Mr. Hae Duk Jung.

a) Paragraphs A. 1 7), 8) and 9)

While it is correct that there have been 6 hearings and the submission of 5 and 3 briefs by HMD and the defendants respectively, I note that only one of the briefs submitted by each party concerned the merits of the case in any detail. Further, most of the evidence submitted by HMD relate to the factual background of the cane. In respect of HMD's evidence denying the existence of any defect or liability on its part, such as Exhibit A-13 (which I note is a report prepared by HMD internally), the defendants in the First Korean Proceeding in turn have to show the defect and the cause to hold HMD liable, which the defendants have not yet begun to do. Therefore, while Mr. Jung's statement creates the impression that there has been substantial progress in the First Korean

Proceeding, this is not the case since the defendants have not addressed the merits of the claim in any detail upto now.

b) Paragraph A. 1. 10)

The Court has requested the parties to submit any briefs and evidence before the next hearing, but it is not an order with a deadline that would preclude the parties from making farther submissions.

c) Paragraph 2. 2)

It is incorrect that Kim & Chang refused to accept service of process of the defendants in the Second Korean Proceeding for the reason of the difficulties of the large number of defendants. The reason that Kim & Chang could not accept service of process for the Second Korean Proceeding was because it was not authorized to accept service by the said defendants. As discussed above, the lack of progress in the Second Korean Proceeding is wholly due to HMD's failure to take steps to make service abroad. The fact that HMD initiated the declaratory judgment action in Korea against only 3 of the Cargo Interests in the New York proceedings first and then later filed another action against the remaining 1,003 Cargo Interests appears to be a deliberate attempt by HMD to bypass having to make service of process abroad (like in the First Korean Proceeding) against each of the large number of defendants, by trying to make service on the counsel for the defendants in the First Korean Proceeding.

Appendix E

d) Paragraph 3

> Regarding the last sentence of this paragraph, as noted above, in the case on the merits, the defendants in the First Korean Proceeding (that is, the 3 Cargo Interests (claimants) in the New York proceedings) shall show the defect and that the cause of the defect to hold HMD liable. It is not up to HMD to decide when all the necessary submissions to establish the claim have been made in order to bring the proceeding to a close.

13. Regarding the statute of limitation, Korean law provides that the applicable time-bar for tort actions is three years from when the damage and the tortfeasor are discovered by the victim or ten years from when the tortuous act is committed, whichever is earlier. However, there are a number of decisions by the Korean Supreme Court, which provide that in cases where the defect in question is latent, the ten year statute of limitations may begin to run when the latent defect becomes patent. I note that the three-year statute of limitations is not usually relevant since the victims normally file a lawsuit within three years of becoming aware of the damage and the tortfeasor. Hence, in the subject case, we believe that the ten-year statute of limitation had begun to run when the Vessel broke into two. As noted above, HMD raised a defence based on the statute of limitation in the First Korean Proceeding, to which we had responded to the above effect.

Dated: November 18, 2004

s/ Byung-Suk Chung
BYUNG-SUK CHUNG
KIM & CHANG

APPENDIX F — SUPPLEMENTAL DECLARATION OF BYUNG-SUK CHUNG

I, Byung-Suk Chung, declare under the penalty of perjury under the laws of the United States of America that the following statements are true and correct to the best of my knowledge:

1. I am a partner and the head of the shipping practice group at the law firm of Kim & Chang, Seyang Building, 223 Naeja-long, Chongro-ku, Seoul, Korea. I have been a member of the Korean bar since 1980. I hold an LL.B. degree from Seoul National University in Korea and an LL.M. in Maritime Law from University College, University of London. I was also a visiting foreign lawyer for six months at the law firm of Haight, Gardner, Poor and Havens (now Holland and Knight) in New York. The details of my background and experience are set out in the attached *curriculum vitae* (Exhibit 1).

2. I have read the October 17, 2005 decision of the United States Court of Appeals for the Second Circuit in *Rationis Enterprises Inc. of Panama, et al. v. Hyundai Mipo Dockyard Co., Ltd., et al.,* Docket nos. 04-4267-cv, 04-5571-cv (L), 04-6028-cv (CON), as well as the Opinion and Order of the United States District Court for the Southern District of New York dated July 9, 2004. The cargo interests and North of England ("NOE"), who are appellees in those appeals, have asked me to review and comment on the Second Circuit's finding that,

> ". . . Korean law bars the cargo interests and NOE from recovery against Hyundai due to statutes of repose, . . ."

This finding is an incorrect statement of Korean law.

Appendix F

3. The U.S. Second Circuit refers to two Korean statutes of limitations (incorrectly identified as statutes of repose in the U.S. Second Circuit's decision) to support its finding. One statute is Article 7 of Korea's Product Liability Act. The provisions of that Act, however, and in fact the entire Act itself was only enacted on January 12, 2000, as Law No. 6109, and took effect as of July 1, 2002, long after the elongated vessel was delivered. There was no such Act in effect in 1997 when the vessel broke into two. Therefore, under Korean law, the said Act and its provisions do not apply to and have no application to the claims asserted by cargo interests/NOE in the matter that was on appeal to the U.S. Second Circuit.

4. The other statute of limitations referred to by the U.S. Second Circuit is Paragraph (2) of Article 766 of the Korean Civil Code. Article 766 is the Korean statute of limitations for tort actions in general and the statute of limitations that a Korean court would apply to the claims asserted by cargo interests/NOE against Hyundai Mipo Dockyard Co., Ltd. and Hyundai Corporation (collectively, "Hyundai") for negligence. No part of Article 766 constitutes a statute of repose.

5. Article 766 states and has so stated since 1958 when the Korean Civil Code was first enacted:

> *Article 766 (Prescription in respect of the Right to Claim for Damages)*
>
> (1) The right to claim for damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing from the date on which the injured party or his agent by law becomes aware of such damage and of the identity of the person who caused it.

(2) The provisions of paragraph (1) shall also apply if ten years have elapsed from the time when the unlawful act was committed.[1]

The earlier to occur of the events set forth in Paragraphs (1) and (2) of Article 766 applies. In other words, under Article 766, the rights to claim in tort shall be extinguished either within 3 years of when the damage and tortfeasor both become known (Paragraph (1)) or within 10 years of when the "unlawful act" was committed (Paragraph (2)), whichever comes earlier. At issue in the present case is when the 10-year period under Paragraph (2) began to run.

6. There have been two interpretations applied to cases where the damage does not materialize simultaneously with or shortly after the unlawful act, but materializes after a span of time from the "unlawful act" itself. These interpretations differed on when the 10-year period in Paragraph (2) begins to run and what is meant by "unlawful act" as used in that paragraph. One interpretation favored a strict reading, which considered the 10-year period as starting to run from when the unlawful act was committed. The other interpretation,

1. Although this English translation of Article 766 is the version published by the Korea Legislation Research Institute ("KLRI") in 2002, I do not believe this translation is the most accurate, particularly with respect to the term "unlawful act." In view of the Korean Supreme Court's established interpretation of Paragraph (2) of Article 766, "unlawful act" fails to embody or imply the full purport of the original Korean term *(bul-beop-haeng-wi)* and could potentially be misleading. In any event, for the sake of consistency and convenience, the KLRI's version of Article 766 and the term "unlawful act" will be used in this Declaration and all of the exhibits attached thereto.

however, viewed the 10-year period as commencing from when the damage caused by the unlawful act materialized, rather than from when the unlawful act was committed.

7. In 1979, the Korean Supreme Court, the highest court in Korea, handed down a decision en bane adopting the second interpretation and ruling that the 10-year period should be interpreted as having commenced from when the damage due to the unlawful act materialized. Since then, the Supreme Court has maintained this interpretation and application of Paragraph (2) of Article 766, and lower Korean courts have likewise followed and applied the same interpretation.

8. One Korean Supreme Court case concerned a building that collapsed due to a defect in the building's construction during a fire that occurred more than 10 years after the building was erected (Korean Supreme Court decision dated May 8, 1998, case no. 97*da*36613). Were it not for a construction defect, the building would not have collapsed during the fire. A lawsuit was brought against the builder of the building shortly after the fire, and one of the defenses raised was the statute of limitations under Paragraph (2) of Article 766. The Supreme Court in its decision ruled that the 10-year period began to run from the date of the building's collapse, when the damage caused by the construction defect materialized. The claim was therefore not time-barred under Paragraph (2) of Article 766. A copy of this decision is attached, together with an English translation (Exhibit 2).

9. In another Korean Supreme Court case (Korean Supreme Court decision dated January 12, 1990, case no. 88*daka*25168), a mortgage was registered based on a prior erroneous property

registration. The property had originally been registered in the name of the true owner ("A"). However, in 1976, pursuant to the request of the brother of A ("B"), the local administrative office (which handles the registration of Korean residents/citizens) negligently issued a certificate stating that A and B (who had similar names) were the same person. In 1981, using the erroneously issued certificate, B had the name of the owner of A's property changed to B's name. A third individual ("C"), who had dealings with B, then registered a mortgage against the property after it was wrongfully registered under B's name. The true owner, A, subsequently discovered the mortgage registered against his property and applied for the cancellation of the mortgage. A court judgment canceling C's mortgage was consequently issued in 1986. C then sued the administrative office in 1988 for negligently issuing the certificate that incorrectly identified A and B as the same person. During the proceedings, it was argued that the rights of C were time-barred under Paragraph (2) of Article 766, as more than 10 years had lapsed from when the administrative office had negligently issued the certificate. The Supreme Court, however, disagreed and found that the 10-year period began to run when the damage resulting from the unlawful act materialized. In this case, the damage materialized and the 10-year period stated in Paragraph (2) of Article 766 began to run in 1986 when C's mortgage was cancelled. C's claim, therefore, was held not to be time-barred. A copy of the Korean Supreme Court's decision in this case is attached with an English translation (Exhibit 3).

10. The lower courts in Korea have followed the Korean Supreme Court's interpretation of Paragraph (2) of Article

Appendix F

766. In a recent case, a bridge in Seoul, which had been built in 1979, collapsed in 1994 when a mid-section of the bridge suddenly fell into the river. In 1995, a lawsuit was filed against the builder of the bridge, and the statute of limitations in Paragraph (2) of Article 766 was raised, *inter alia*, as a defense. The first-level court, in following the Korean Supreme Court's interpretation of Paragraph (2) of Article 766, held that the 10-year period started to run from the date of the accident in 1994, rather than in 1979 when the bridge was built, and found the claim was not time-barred. This decision was not appealed and has become final. A copy of this decision is attached, together with an English translation (Exhibit 4).

11. The above application of Paragraph (2) of Article 766 has been established as the proper interpretation of the provision, and there are no instances where the Korean courts have diverged from or disagreed with this interpretation of the provision. Korean legal commentators have also confirmed the Korean Supreme Court and lower Korean courts' application of the 10-year statute of limitations set forth in Paragraph (2) of Article 766. One such legal commentary is attached with an English translation (Exhibit 5).

12. Paragraph (2) of Article 766 states that the 10-year period starts to run from "when the unlawful act was committed." The Korean Supreme Court has conclusively established that the proper interpretation of this phrase is that the 10-year period does not begin to run until the unlawful act has been committed *and* the damage resulting from that unlawful act has materialized. Accordingly, under the facts as stated in

the opinion of the U.S. District Court and the U.S. Second Circuit, the 10-year period under Paragraph (2) of Article 766 did not begin to run until November 24, 1997, the date of when the vessel broke into two pieces. This is how the Korean Supreme Court and the lower Korean courts have construed the meaning of Paragraph (2) of Article 766, and it is the law of Korea that applies to the claims of the cargo interests/NOE for negligence against Hyundai.

13. Any claim for indemnity by NOE against Hyundai would be subject to a 10-year statute of limitations. The 10-year period begins to run from when the rights to indemnity arose, that is, the date of payment of settlement to the claimant or the date of payment of judgment.[2]

14. It should be noted that Korea does not have a "Settlor Bar Rule" governing claims between joint tortfeasors. Unlike the legal theory mentioned at footnote 3 of the U.S. Second Circuit decision, in Korea a tortfeasor who pays a claimant is entitled to seek either contribution or full indemnification from the other tortfeasor. This is considered a substantive principle of law.

15. Therefore, in conclusion, the ruling of the U.S. Second Circuit Court, with due respect, is in error.

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2. See, *inter alia*, Korean Supreme Court decision dated May 15, 1979, case no. 78 *Da* 528, Korean Supreme Court decision dated January 11, 1994, case no. 93 *Da* 32958, Korean Supreme Court decision dated March 26, 1996, case no. 96 *Da* 3791.

Appendix F

Dated: Seoul, Republic of Korea
October 27, 2005

s/ Byung-Sak Chung
Byung-Sak Chung
Kim & Chang

APPENDIX G — EXCERPTS OF BRIEF OF APPELLANTS HYUNDAI MIPO DOCKYARD CO., LTD. AND HYUNDAI CORPORATION (PAGES 14-21)

04-4267 -cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RATIONIS ENTERPRISES, INC. OF PANAMA, *ET AL.*,

Counter-Defendants-Appellees,

v.

HYUNDAI MIPO DOCKYARD CO., LTD., *ET AL.*,

Third-Party-Defendants-Appellants.

On Appeal From the United States District Court
for the Southern District of New York

BRIEF OF APPELLANTS
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AND HYUNDAI CORPORATION

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Appendix G

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* * *

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ARGUMENT

I. THE DISTRICT COURT IMPROPERLY APPLIED U.S. LAW TO THE CARGO INTERESTS' CLAIMS.

Perhaps most evident of the district court's errors in the liability phase is its unsupportable ruling that HMD and HC waived the application of foreign law and that the court could permissibly apply U.S. law despite the complete absence of any connection to the United States. The Court reviews de novo the district court's determinations under rule 44.1 to apply U.S. law and that HMD and HC failed to give "reasonable notice" of the applicability of foreign law. *See Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998).

Appendix G

A. The District Court's Decision to Apply U.S. Law Was Incorrect Under Supreme Court Choice-of-Law Precedent.

Although several nations arguably have some connection to the incident, there was no reasonable basis for applying U.S. law. In this case, a Korean company lengthened the ship in Korea under a contract governed by English law, negotiated in Sweden, and executed in England; at the time of the lengthening, the ship sailed under a Swedish flag and was owned and managed by Swedish nationals; and when it broke apart in international waters in the North Atlantic, the ship flew under a Panamanian flag, was owned by a Panamanian corporation, and carried goods owned by parties from all over the globe. The district court should [15] have followed established choice-of-law precedent and applied Swedish or Korean law to any tort-based claims, and English law to any contractual claims.

The cargo interests' claims clearly arise in admiralty, so the district court should have used federal maritime choice-of-law rules to identify the substantive law to apply to the cargo interests' admiralty claims. *Advani Enters., Inc. v. Underwriters at Lloyds,* 140 F.3d 157, 162 (2d Cir. 1998). Those choice-of-law rules rest on factors identified by the Supreme Court in *Lauritzen:* (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the injured plaintiffs' allegiance or domicile; (4) the defendants' allegiance or domicile; (5) the place of the contract, if any; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. *See Sundance Cruises Corp. v. Am. Bureau of Shipping,* 7 F.3d 1077, 1082

(2d Cir. 1993); *see also Lauritzen v. Larsen,* 345 U.S. 571, 583-92 (1953). Although the list is not exhaustive, and the weight given to each factor varies from case to case depending on the "national interests served," *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306, 309 (1970), generally, the law of the ship's flag must prevail "unless some heavy counterweight appears," *Lauritzen,* 345 U.S. at 586. A proper choice-of-law analysis makes clear that the district court lacked any basis for applying U.S. law.

Tort claims. The district court erred in applying U.S. law to the cargo interests' tort claims. Applying the *Lauritzen* factors, Swedish or Korean law were [16] the only viable possibilities. The law of the ship's flag should ordinarily govern, *id.,* and this Court has emphasized the national interests of the flag state, especially its interests in regulating repair and conversion work and assuring the safety of a country's vessels. *Sundance,* 7 F.3d at 1082. The ship sailed under a Swedish flag at the time the contract was executed and performed. As the flag state, Sweden had a strong national interest in ensuring the project's safety and defining the shipyard's standard of care, and *Lauritzen* counsels reliance on Swedish law.

Moreover, the vessel was owned, operated, and crewed by Swedish citizens throughout the period of contract performance, implicating Sweden's strong interest in protecting its nationals and permanent inhabitants. *See Lauritzen, 345* U.S. at 586. Indeed, the application of U.S. law raises serious due-process concerns, because neither HMD nor HC could have reasonably anticipated in 1984 that U.S. law would apply. Not until almost twenty years after

HMD's performance of the lengthening contract did strangers to the transaction argue that U.S. law should define HMD's and HC's duties. A-337.

Under Swedish law, the cargo interests have no tort-based warranty, negligence, or products-liability claims. Substantive statutes of repose completely bar all of the tort-based claims. *See* SPA-12, §2; SPA-17, 20; SPA-26, §11. Because more than ten years had elapsed from the time when the allegedly unlawful acts were committed, the cargo interests have no cause of action. SPA- [17] 12, §2; SPA-17, 20; SPA-26, §11. A statute of repose precludes a cause of action's existence once the applicable period has passed and "is a substantive provision which may not be waived." *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985); *see Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 902-03 (6th Cir. 2002) (explaining same).

Other Swedish legal doctrines and statutes independently bar the cargo interests' claims. First, Swedish law requires claimants to prove the necessary facts of their claim and causation by clear and convincing evidence, a task that these claimants cannot accomplish. A-308 (citing PER OLOF EKELÖF, RÄTTEGÅNG 69-70 (6th ed. 1992)). For tort-based claims, if a defendant puts forward an alternative theory about the cause of damage, the claimant must prove his theory to be "clearly more probable." A-309 (citing 1991 NJA 481 (Supreme Court of Sweden)). The cargo interests could not have established facts necessary to prove that the cargo interests' theory was "clearly more probable" and that causation was proved by clear and convincing evidence. Second, Sweden's Product Liability Act of 1992 does not

recognize product-liability claims for products "placed on the market" before January 1, 1993. SPA-26 at nn.1-2. Third, Sweden's vicarious-liability doctrine provides an absolute bar against third parties' fault-based claims. For example, when *A* contracts with *B* to carry out repair or construction work on *B*'s property and delegates the performance of the work to *C*, *A* may be liable to *B* [18] for any negligence on the part of *C*, even though *A* is not at fault. But third parties who suffer harm from negligent work cannot hold *A* liable in tort. A-310. Thus, the cargo interests, as third parties to the contract, have no recourse against HC, because HC delegated the performance of the contract to HMD.

In sum, all tort-based claims—whether in warranty, negligence, or products liability—fail under Swedish law.

If this case is not to be decided by the flag of the ship, then Korea's "substantial and continuous" contacts to the events underlying the tort-based claims predominate the remaining *Lauritzen* factors. The alleged wrongful acts occurred in Korea, and the defendants' nationality and base of operations were (and are) Korea. These three factors—the place of the alleged wrongful act, the parties' domiciles, and the parties' bases of operations—"weigh heavily" in favor of applying Korean law. *Carbotrade, S.p.A. v. Bureau Veritas,* 99 F.3d 86, 91-93 (2d Cir. 1996).[5] The place of the contract was irrelevant because, as in this case, "no direct contractual relationship exist[ed] between the plaintiff and the

5. *Carbotrade*'s identification of Greece, rather than international waters, as the place of the wrongful act refutes claimants' argument that international waters were the place of the alleged wrongful act. A-338-41.

defendant." *Carbotrade,* 99 F.3d at 91. Furthermore, the accessibility of the foreign forum was irrelevant. *Id.* Finally, as in this case, the law of the forum "is irrelevant . . . because this litigation is in the courts of the United States." *Id.* A [19] Korean shipyard performing work in Korea would have had fair notice that it could be liable for breaches of Korean law.

Korean law bars the tort-based claims. Like Swedish law, Korean law imposes substantive ten-year statutes of repose for tort and products-liability claims that run from the time when the allegedly wrongful act was committed. SPA-6, art. 766(2); SPA-11, art. 7(2). Additionally, Korean law does not recognize products-liability claims arising from activities that occurred before July 1, 2002, SPA-11 at nn.1-2, so the cargo interests' products-liability claims undeniably fail under Korean law.

The only other potentially relevant jurisdiction is Panama, because the ship sailed under a Panamanian flag at the time of the casualty and the shipowner was incorporated in Panama. But the shipowner is not a party to these claims, making the flag of the ship at the time of the casualty of little importance. *See Carbotrade,* 99 F.3d at 92-93. Any Panamanian contacts are tenuous at best when compared with those "more pertinent to the dispute[s]" in this case. *Id.* at 93.

The claimants' domiciles and bases of operation are too splintered to point to any particular country. The cargo interests have previously argued that many of them are either domiciled in the U.S. or have a "connection to the United States," A-337, but the largest bloc of cargo interests is based

in Europe, and the Court's choice-of-law analysis has assigned no importance to the domicile of exclusively [20] U.S. cargo interests or the fact that lost cargo was bound for the United States. *See Carbotrade,* 99 F.3d at 89-93. Korean law clearly governs if the law of the flag state does not apply.

Contractual claims. It is not clear whether the district court held that the warranty claims derived from the 1984 lengthening contract. A-162. But even if they did, the Court's modified *Lauritzen* test for contract-based admiralty claims would undoubtedly honor the contracting parties' choice-of-law provision, *see* A-213, in favor of English law. *See M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972); *Advani,* 140 F.3d at 162. English law would bar all of the cargo interests' contract-based warranty claims. The solitary express warranty guaranteed against defects for only twelve months and explicitly excluded "damage of cargoes." Additionally, English law recognizes "no such warranty . . . as a 'warranty of workmanlike service,'" and no warranties (whether "express or implied") could have arisen in favor of the cargo interests because the contract was "without the very specific and effective wording required under English law." A-304-05; *see also Tweddle v. Atkinson,* 121 Eng. Rep. 762 (K.B. 1861).

In sum, none of the *Lauritzen* factors supports the district court's application of U.S. law to the cargo interests' claims. The Court should decide that U.S. law does not apply, that Swedish or Korean law governs the tort-based claims, that [21] English law governs the contractual claims, and that the relevant foreign law bars the cargo interests' claims.

* * * *

APPENDIX H — LIST OF PETITIONERS

North of England Protecting and Indemnity Association
AgteGebrueder
Albingia Versicherung AG,
Allianz Versicherungs AG
Alteleipziger Versicherung AG
Basler Versicherung AG
Colonia Versicherung AG
Droege Versicherung AG
Frankfurter Versicherung AG
Gayen, Berns & Homann
Helvetia Versicherung AG,
Haftpflichtverband
Der & Deutsch en Industrie V.a.G.
Leve & Neil Versicherung AG
Nordstern Versicherung AG
Securitas Deutsche Versicherung AG
Wintenhur Versicherung AG
Wuertembergisehe & Badische Versicherung AG
Erich Schultz
Erst Allgemeine Versicherung AG
Nurnberger Versicherung AG
Gustav F. Hubener
Victoria Versicherung AG
Aachener & Muenchener Versicherung AG
Berner Allgemeine Versicherung AG
Peiner Versicherung Luboke & Co.
Bayrische Versicherung
Schunck Versicherung AG
Carl Schrotter K.G.
Transatlantic Allgemeine Versicherung AG
SDI Diagnostics

Appendix H

Nemo Tile, Inc.
Juliette Habib
Import Associates, Inc.
Paskez Candy Co., Inc.
Ampo USA
Tony's Imported Marble & Tile Inc.
Gallery Tile Inc.
Dean Carpet and Dean Trading
Carolina Wine Company
Evert Marechal
Vasa America, Inc.
Galt G/S
A/S Forsikringsselkabel Codan
Firemans Fund Mcgee Marine Underwriters
Tryg Baltica Forsikring
Security Insurance Company of Hartford
Industrial Insurance Co., Ltd.
Royal & Sun Alliance
Groves, John & Westrup, Ltd.
St. Paul Fire and Marine Insurance Company
International Marine Underwriters
Gerling America Insurance Company
Yasuda Fire & Marine Insurance Company of America
Arkwright Mutual Insurance Company
Factory Mutual Insurance Company
HSBC Insurance Ltd.
Nusantra Worldwide Insurance
The Travelers Insurance Companies
The Travelers Property and Casualty Corporation
Tenaga Insurance SND. BHD.
Eastern Maritime Underwriters

Appendix H

Atlantica Insurance Company
EFU General Insurance
HSBC Insurance (Asia) Ltd.
United India Insurance Company
Musini
Ceska Pojistovna A.S.
Assimoca Spa.
Gerling Konzern Allgemeine Versicherungs
Aktiengesellschaft
Gerling Italia Srl
Gerling Service Nederland N.V.
Hannover International Insurance (Nederland) N.V.
Royal Nederland Schadeverzekering N.V.
Royal Insurance Co. Of Canada
Maritime Insurance Company Ltd.
Axa Pacific Insurance Company
Guardian Insurance Company of Canada
Commercial Union Assurance Co.
Axa Boreal Insurance Inc.
Federation Insurance Company of Canada
Norwich Union Fire Insurance Society Ltd.
Guardian Royal Exchange Assurance Bhd.
Cigna International
Cigna Insurance Company of Canada
Cigna Insurance Company of Europe Sanv
Maritime Insurance Company Ltd.
Commercial Union Assurance Company, P/C
National Insurance Company
Guardian Insurance
Chubb Insurance Company of Europe
Insurance Corporation of Ireland

Appendix H

Eagle Star Re
Ace Insurance SA-NV
Axa Global Risks Services UK (Ltd.)
Horace Holman
Cornhill Insurance Company
Aon Hudig Expertise Bureau Binnendijk-bree B.V.
Broeckx & Co. N.V./S.A.
Heathcock Marine & Transit Underwriters
Grupo Vitalicio Buse & Schwartze
Wendt & Co.
Cesam, Paris, Lehavre and Bordeaux
H. Fordham & Co. B.V.B.A.
Lloyd Thompson
Cunningham Marine Bv Hsbc Gibbs Ltd
Lanoire et Chevtlliat
AON Group Ltd. (London)
Union Insurance Society of Hong Kong Limited
General International Limited
New India Assurance Co., Ltd.
Malayasia British Kualalumpur
Great Lakes Reinsurance (UK) Plc
Skandia Insurance Company Ltd.
Swiss Re
Munich Re
Schermer Assuradeuren B.V.
Guardian Insurance
Chubb Insurance Company of Europe
El via Swiss Insurance Company
Gothaer Gversicherungsbank
Aim Belgique S.A.
Delta Lloyd Schade

Appendix H

Le Continent
Lucent Technologies, Inc.
Oetker, Ltd.
Exxon Chemical Company.
Cummings Engine Co.
AEP Industries
Albert F. Fitzgerald
Angelo Brothers
Anolini Luigi SpA
Antares Spa
ASC, Inc.
Ausimont SpA
Axson North America
B.F. Goodrich
Banfi
Baris Shoe
Benix & Co.
BIC Corporation
Societe BIC S.A.
Black & Decker
The Black & Decker Corporation
Blackstone
Boston Wine Co.
Brinkman
Car Component Technologies
Circle Imports
Classic Imports
Connors Footwear
Cosmair Inc.
L'Oreal S.A.
Crosby & Baker

Appendix H

Crest Tiles
Crystal International
C.W. Fifield
DAL Tile
Dal-Tile International Inc.
Danzas
Delsee Luggage, Inc.
Deroma USA, Inc.
Dickson Alberton Mills, Inc.
Distributors Metal Corp.
Dufferin Tile
Easy Day Manufacturing
Epston Inc.
Euromarket Designs
Federated Merchandising Group
Fidelity Stainless Steel
Fiefield
Finoli Agroalimentare
Fried Krupp/PSL
Fried.Krupp AG Hoesch-Krupp
Fusite Division
G.H. Bass & Co.
Phillips Van-Heusen
Genicom Corp.
Genicom Corporation
Green Bay Supply Co.
Greening Donald Co.
Harris Welco
Hastings
Hoboken Floors
Hoffman LaRoche

Appendix H

Roche Holding
Hoffman Carbon, Inc.
Independent Machinery
International Flavors & Fragrants
International Flavors & Fragrances Inc.
Kobrand Corporation
Lalique North America
Louis Mian
M.S. Walker
Maple Terrazzo
Masciarelli Wine Co.
Maxwell Shoe Co.
Maxwell Shoe Company, Inc.
Mayrand Ltd.
Meadows Wye
Metal Center Rochester
Metco Tile Distributors
Midwest Truck & Auto Parts Inc.
Mobility Systems
Mondial Dry Claeaning
Mouli Manufacturing Corp.
North American Shippers Association
Peerless Import
Peleon
Princess House, Inc.
R&R Marketing
Rittal Corp.
Salton Maxim
Salov North America
Salvona
San Pellegrino

Appendix H

Seagrams
The Seagram Company Ltd.
Socks & Accessories
Solvay Chemicals
Solvay S.A.
Spirec NA
Tandler Textiles
TCMBandt
Tico Titanium Inc.
TJX Companies, Inc.
The TJX Companies, Inc.
Trefilabed Inc.
Tyfield Importers Inc.
Valbruna Corp.
Venture Tape Corporation
Villeroy & Boch
Westchester Marble & Granite
Wayne Tile
Webster Valve
Wilson UTC Inc.
Y.M.F. Carpet
American Commercial
International Building Export Trade s.r.l
Marcuse Glues & Chemicals
Fuisz Technology
Raychem Corporation
Long Island Pipe & Supply, Inc.
Can-American Foods Ltd.
Copreci S. Coop
New England Household International
Mapfre Industrial S.A.

Appendix H

Industrias Roko S.A.
J.F. Hillebrand / Team S.A.
Zilmet dei Fretelli Benettolo SpA
ALF UNO SpA
Eddie Rose Collection
LaForesta S.r.l.
Italstuhl
Astoria S.r.l.
Sinesta 2 S.p.A.
William Smethurst
Apolo's
Pasquale Food Imports
Home Essentials
Itamobili Inc.
Rizzoli, Inc.
Martex Furniture
Newton Buying Corp.
Smethurst & Son
Bennett
Encore Shoe Corp.
Kysela Pere et Fils Ltd.
Adamba Imports International
Advanced D.C.
ALF UNO S.p.A.
Allied International
Banfi
Boston Wine Co.
C. Bruno & Co.
Comprador
Conestoga
Daylor Creations

Appendix H

Eastern Imports Ltd
Eddi Rose Collection
Euro American
Hermes of Paris
Hermes International SA
Infolog
Jaydor Corp.
MidWest Transportation
Mimax
Albini & Pitigliani
M.S. Walker
Nomalas
Nordberg Sales Corp.
Pasternak Baum
Ranin
Ricoh Corporatio
Ricoh Company, Ltd.
R.L. Pritchard
Rykoff-Sexton
Sea Gull
Smethurst & Sons
Stanley Works
The Stanley Works
Strohmeyer & Arpe
Supertrends
Henry P. Thompson
Tower Group International
Uneeda Enterprise
Velsicol Chemical Corp.
Zambiti Parati S.p.A.
Loh Optical Machinery, Inc.

Appendix H

SI Handling
Trace International Holding
Taco, Inc.
Santa Maria Foods Ltd.
Midwest Transatlantic Lines
Mikasa Canada
Acciaierie Valbruna
DO.CA srl
Newton Buying Corp.
Tower Group International
Maline Tile
Dinico Products
Gilmore Furniture
Bayard Sales Corp.
Mrs. Brenca Lucia
Peg Perego
Morse Manufacturing
The Atlantic Mutual Companies
Chubb Group of Insurance Companies
CNA
General Accident Insurance Company
Gulf Stream Insurance Co., Ltd. (Ireland)
Hannover International GmbH
La Fondiaria Assicurazioni
Protection Mutual Insurance Company
Royal & Sun Alliance Insurance Group
SAI Societa Assicuratrice Industriale
Toro Assicurazioni
Winterthur Assicurazioni
Zurich International Italia
Polaris Assicurazioni

Appendix H

Riunione Adriatica Di Sicurta
Schreiber Foods International, Inc.,
L'Oreal Group
Philips Corp.
Aston Martin Lagonda Limited
Ikea Wholesale Inc.
Eaton Corporation
Thomson Consumer Electronics, Inc.
Coach Leatherware Company, Inc.
Tupperware Corporation
Mascotech Forming Technologies
Syratech, Inc.
J. Baker, Inc.
Air Express International, Inc.
The Rockport Company, Inc.
McCormick & Company
Great American Insurance Company
A.I.G. Europe S.A.
American International Underwriters
American Home Assurance Company
Albany Insurance Company
Cigna Insurance Company of Europe
Continental Marine Insurance Company Ltd.
DuPont Printing & Publishing
E.I. DuPont De Nemours & Co. Inc.
Fidelity and Guaranty Insurance Company
Indemnity Insurance Company of North America
Insurance Company of North America
Menorah Insurance Company Ltd.
Migdal Insurance Company Ltd.
The Israel Phoenix Assurance Company Ltd.

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The Magen Insurance Company Ltd.
Reliance Insurance Company
Intercargo Insurance Company
Washington International Insurance Company
Warta Insurance and Reinsurance Company S.A.
Polcontainer Co.
Atlantic Container Lines
POL-Atlantic Spolka ZO.O.
SAMP/USA, Inc.
Reliance Insurance Company
Robert Reiser & Company, Inc.,
BNP Distributing Co., Inc.
Allura Imports, Inc.
Qualipac Corporation
Friendly Fruit, Inc.
Transflow Energy, Inc.
Charmer Industries, Inc.
Palm Bay Imports, Inc.
Arriflex Corporation
Lumbermens Mutual Casualty Company
American Motorists Insurance Company
The Timberland Company
Abel & Schaefer, Inc.,
A. Clifton,
Agricola Conservera,
Air Techniques, Inc.,
Albini & Pitigliani SPA,
Albion Insurance Company Ltd.,
Alfred Balguerie S.A.,
Allesiure Corporation,
Allied Signal, Inc.,

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Alpi USA, Inc.,
Alpina Insurance,
ALS SRL,
ASG USA,
Arley Wholesale, Inc.,
Art Logistics, Ltd.,
Atege,
Barthco International, Inc.,
Bortesi & Company,
Boston International, Inc.,
Bramati Marble & Granite, Inc.,
Brastile, Brazos Sportswear, Inc.,
Brunco Milella & Co.,
Buchtal Corp. USA,
Carleton Woolen Mills, Inc.,
Cassel Imports,
Cincinnati Milacron,
C.J. International, Inc.,
Classic Wine Imports, Inc.,
CML Group, Inc.,
C.M. Rolph, Con Protec, Inc.,
Continental Worsted, Inc.,
Core-Tek Products,
Creative Technologies,
Crown Automobile Sales Co.,
Crown Delta Corp.,
C.S.S. Industries,
Daniel Young,
D. Coluccio & Sons, Inc.,
Demptos Glass Company LLC,
Dycem, Ltd.,

Appendix H

Edward Elgar Publishing, Inc.,
EFCO Importers,
Emile Henry USA,
Euinta Handelsges MbLt,
F.A.M. Bohlke Veneer Corp.,
Ferromatik Milacron,
Filene's Basement, Inc.,
Fleet Bank National Assoc.,
Florian Papp,
Forte Cashmere Co., Inc.,
Frank Ehrensteit,
F.T.I.,
Fuji Flim Micordisks USA, Inc.,
Fuji Magnetics GMBH,
GC America, Inc.,
Gebroder Hirdes Int'l Sped Ltd.,
Gee & Garnham Ltd.,
Gerrit J. Verburg Co.,
Gilde Braverei,
Global Imports, Inc.,
G.M. Crocetti, Inc.,
Conrand Gosiger, Inc.,
Hadaikan Ltd.,
Hascoe Associates,
Hauni Richmond, Inc.,
Hillebrand Mainz,
Hirdes Freight Ltd.,
Hispanagar S.A.,
Home Essentials & Beyond, Inc.,
H. Verby Co.,
IHW, Inc.,

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Interplak Ltd.,
International Tile & Stone, Inc.,
Jacques Cohen Corp. of NJ,
JBF Maschinen BMBH,
J.D. Craft,
Jeneric Pentron, Inc.,
JFC International, Inc.,
J.F. Moran Co.,
J. Klein & Company,
Joan and David Helpern, Inc.,
K-3 Corporation,
Karl Heniz Dietrich GMBH,
Kerr Corporation,
Krautica Pharma GMBH & Co.,
Lemforder Corporation,
Linon Home Décor Products, Inc.,
Maline Tile Company, Inc.,
Mannesmann Demag Corp.,
Mannington Mills, Inc.,
Marbel & Granite, Inc.,
Marlo Furniture,
Marston Books Service Ltd.,
Maryland Tile Center,
Maxim International,
Maxwell Shoe Company, Inc.,
Mia Foods,
Mixpac Systems AG,
MSAS Cargo Int'l.,
Natural AG,
Nourieh Brothers,
Orlando Food Corp.,

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Pacific Traning Co., Ltd.,
Paris Ceramics, Inc.,
Pastifico Lucio Garofolo S.P.A.,
Polyclad Europe A.S.,
Polygal USA, Inc.,
Pro Bake, Inc.,
Pro Freight Brokers,
P.T. Bali Maya Permai,
Plymouth Mill,
Puran Foods Ltd.,
Querolo USA, Inc.,
Raffaele Viscardi SRL,
R.I. Dozorets,
Rohm and Haas Company,
Schenker International, Inc.,
Seeam Allgem Transportges,
MGH, Servolift Eastern Corporation,
Sinco, Inc.,
Smith & Hawken, Sparex, Inc.,
Sun Air System Awning Sun Limited,
S.T.I.C., Inc.,
Titon Industries,
United Abrasives,
U.S. Marble Importers, Inc.,
Watts Regulator Co.,
Whitehall Co., Ltd.,
Wilkstone Contractors, Inc.,
William Grant & Sons, Inc.,
Wilson Freight Systems,
Wine & Spirits Shippers Assoc.,
Witex AG,

Appendix H

W. Rondina,
XC Corp.,
Yvon Mau Wines, Inc.,
Z.F. Industries,
Zurich International Ltd.,
Zurich International (UK) Ltd.,
Zust Ambrosetti, Inc.,
Allianz Insurance Company of Canada,
Fireman's Fund Insurance Company,
Hartford Fire Insurance Company,
Independent Insurance Co., Ltd.,
New India Assurance Co., Ltd.,
Tokio Marine and Fire Insurance Co., Ltd.

APPENDIX I — RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, North of England Protecting and Indemnity Association, has no parent corporation and no publicly-held company owns 10 % or more of its stock.

Petitioner, AgteGebrueder has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Albingia Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Allianz Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Alteleipziger Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Basler Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Colonia Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Droege Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Frankfurter Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Gayen, Berns & Homann has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Helvetia Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Appendix I

Petitioner, Haftpflichtverband has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Der & Deutsch en Industrie V.a.G. has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Leve & Neil Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Nordstern Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Securitas Deutsche Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Wintenhur Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Wuertembergisehe & Badische Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Erich Schultz has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Erst Allgemeine Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Nurnberger Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Appendix 1

Petitioner, Gustav F. Hubener has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Victoria Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Aachener & Muenchener Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Berner Allgemeine Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Peiner Versicherung; Luboke & Co. has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Bayrische Versicherung has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Schunck Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Carl Schrotter K.G. has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Transatlantic Allgemeine Versicherung AG has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Galt g/s, is wholly-owned by Danish Crown Ambu.

Petitioner, A/S Forsikringsselkabel CODAN, is wholly-owned by Codan A/S.

Appendix 1

Petitioner, Fireman's Fund McGee Marine Underwriters, is wholly-owned by Fireman's Fund Insurance Company.

Petitioner, Tryg Baltica Forskring is wholly-owned by Nordea Bank AB.

Petitioner, Security Insurance Company of Hartford, is wholly-owned by Fireman's Fund Insurance Company.

Petitioner, Fireman's Fund Insurance Company, is wholly-owned by Allianz Aktiengesellschaft.

Petitioner, Industrial Insurance Co. Ltd., is wholly-owned by Sampo Oyj.

Petitioner, St. Paul Fire and Marine Insurance, is wholly-owned by St. Paul Companies, Inc.

Petitioner, The Travelers Property Casualty Co., is wholly-owned by Travelers Group Inc.

Petitioner, International Marine Underwriters, is wholly-owned by White Mountain Insurance Group, Ltd.

Petitioner, AXA Pacific Insurance Company, is wholly-owned by AXA-UAP.

Petitioner, Maritime Insurance Co., Ltd. is wholly-owned by CNA Financial Corporation

Petitioner, Eastern Maritime Underwriters, is wholly-owned by CNA Financial Corporation.

Petitioner, Gerling America Insurance Co., is wholly-owned by Gerling Konzern.

Petitioner, Arkwright Waltham, USA, is wholly-owned by Factory Mutual Insurance Co.

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Petitioner, Atlantica Insurance Company, is wholly-owned by Invik & Co. AB.

Petitioner, Ceska Pojistovnia A.S., is wholly-owned by PPF Group.

Petitioner, Royal & Sun Alliance, is wholly-owned by Royal & Sun Alliance Group plc.

Petitioner, Chubb Insurance Company of Europe is wholly-owned by Chubb Group of Insurance Companies.

Petitioner SDI Diagnostics has no known parent companies and no publicly held companies own more than 10% of the stock of SDI Diagnostics.

Petitioner, Groves, John & Westrup, Ltd. has no known parent companies and no publicly held companies own more than 10% of the stock of Groves, John & Westrup, Ltd.

Petitioner, Yasuda Fire and Marine Insurance Company is wholly-owned by Meiji Yasuda Life Insurance Company.

Petitioner, Import Associates, Inc. has no known parent companies and no publicly held companies own more than 10% of the stock of Import Associates, Inc.

Petitioner, Nemo Tile, Inc. has no known parent companies and no publicly held companies own more than 10% of the stock of Nemo Tile, Inc.

Petitioner, Paskez Candy Co., Inc. has no known parent companies and no publicly held companies own more than 10% of the stock of Paskez Candy Co., Inc.

Petitioner, AMPO USA, is wholly-owned by AMPO LLC.

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Petitioner, Tony's Imported Marble & Tile Inc., has no known parent companies and no publicly held companies own more than 10% of the stock of Tony's Imported Marble & Tile Inc.

Petitioner, Gallery Tile Inc., has no known parent companies and no publicly held companies own more than 10% of the stock of Gallery Tile, Inc.

Petitioner, Dean Carpet and Dean Trading has no known parent companies and no publicly held companies own more than 10% of the stock of Dean Carpet and Dean Trading.

Petitioner, Carolina Wine Company is wholly-owned by Constellation Brands Co.

Petitioner, Vasa America Inc. has no known parent companies and no publicly held companies own more than 10% of the stock of Vasa America Inc.

Petitioner, HSBC Insurance Ltd. is wholly-owned by HSBC Holdings PLC.

Petitioner, Nusantra Worldwide Insurance has no known parent companies and no publicly held companies own more than 10% of the stock of Nusantra Worldwide Insurance.

Petitioner, Tenaga Insurance SND. BHD, is wholly-owned by Tenaga National Berhad.

Petitioner, EFU General Insurance has no known parent companies and no publicly held companies own more than 10% of the stock of EFU General Insurance.

Petitioner, HSBC Insurance (ASIA) is wholly-owned by HSBC Holdings PLC.

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Petitioner, United India Insurance Company has no known parent companies and no publicly held companies own more than 10% of the stock of United India Insurance Company.

Petitioner, Musini has no known parent companies and no publicly held companies own more than 10% of the stock of Musini.

Petitioner, Assimoca SPA has no known parent companies and no publicly held companies own more than 10% of the stock of Assimoca Spa.

Petitioner, Gerling Konzern is wholly-owned by Talanx A.G.

Petitioner, Gerling Italia SRL is wholly-owned by Talanx A.G.

Petitioner, Gerling Service Nederland N.V. is wholly-owned by Talanx A.G.

Petitioner, Hannover International Insurance (Nederland) N.V. is wholly-owned by Hannover

Rueckversicherung A.G.

Petitioner, Royal Nederland Schadeverzekering N.V., is wholly-owned by Allianz A.G.

Petitioner, Royal Insurance Co. of Canada is wholly-owned by Royal & Sun Alliance Insurance Group Plc.

Petitioner, Guardian Insurance Company has no known parent companies and no publicly held companies own more than 10% of the stock of Guardian Insurance Company.

Petitioner, Commercial Union Assurance Co. has no known parent companies and no publicly held companies own more than 10% of the stock of Commercial Union Assurance Co.

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Petitioner, Axa Boreal Insurance Inc. is wholly-owned by The Axa Group.

Petitioner, Federal Insurance Company of Canada is wholly-owned by The Economical Insurance Group.

Petitioner, Norwich Union Fire Insurance Socieity Ltd. is wholly-owned by Aviva PLC.

Petitioner, Guardian Royal Exchange Assurance BHD is wholly-owned by The Axa Group.

Petitioner, Cigna International is wholly-owned by Cigna Corporation.

Petitioner, Cigna Insurance Company of Canada is wholly-owned by Cigna Corporation.

Petitioner, Cigna Insurance Company of Europe Sanv has no known parent companies and no publicly held companies own more than 10% of the stock of Cigna Insurance Company of Europe Sanv.

Petitioner, National Insurance Company has no known parent companies and no publicly held companies own more than 10% of the stock of National Insurance Company.

Petitioner, Guardian Insurance is wholly-owned by The Guardian Life Insurance Co. of America.

Petitioner, Insurance Corporation of Ireland is wholly-owned by Allied Irish Banks PLC.

Petitioner, Eagle Star Re is wholly-owned by Zurich Financial Services.

Petitioner, Ace Insurance SA-NV is wholly-owned by Ace Limited.

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Petitioner, Axa Global Risks Services UK (Ltd.) is wholly-owned by The Axa Group.

Petitioner, Cornhill Insurance Company is wholly-owned by Allianz A.G.

Petitioner, AON Hudig is wholly-owned by AON Corporation.

Petitioner, Expertise Bureau Binnendijk-Bree B.V. has no known parent companies and no publicly held companies own more than 10% of the stock of Expertise Bureau Binnendijk-Bree B.V.

Petitioner, Broeckx & Co. N.V./S.A. has no known parent companies and no publicly held companies own more than 10% of the stock of Broeckx & Co. N.V./S.A.

Petitioner, Buse & Schwartze has no known parent companies and no publicly held companies own more than 10% of the stock of Buse & Schwartz.

Petitioner, Wendt & Co. has no known parent companies and no publicly held companies own more than 10% of the stock of Wendt & Co.

Petitioner, H. Fordham & Co. B.V.B.A has no known parent companies and no publicly held companies own more than 10% of the stock of H. Fordham & Co. B.V.B.A.

Petitioner, Lloyd Thompson is wholly-owned by Jardine Lloyd Thompson Group PLC.

Petitioner, Cunningham Marine BV has no known parent companies and no publicly held companies own more than 10% of the stock of Cunningham Marine BV.

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Petitioner, HSBC Gibbs Ltd. is wholly-owned by HSBC Holdings PLC.

Petitioner, AON Group Ltd. (London) is wholly-owned by AON Corp.

Petitioner, Union Insurance Society of Hong Kong Limited has no known parent companies and no publicly held companies own more than 10% of the stock of Union Insurance Society of Hong Kong Limited.

Petitioner, General International Limited is wholly-owned by General Motors Corporation.

Petitioner, New India Assurance Co., Ltd. is wholly-owned by The Tata Group.

Petitioner, Malayasia British Kualalumpur has no known parent companies and no publicly held companies own more than 10% of the stock of Malayasia British Kualalumpur.

Petitioner, Great Lakes Reinsurance (UK) PLC has no known parent companies and no publicly held companies own more than 10% of the stock of Great Lakes Reinsurance (UK) PLC.

Petitioner, Skandia Insurance Company Ltd. has no known parent companies and no publicly held companies own more than 10% of the stock of Skandia Insurance Company Ltd.

Petitioner, Swiss Re has no known parent companies and no publicly held companies own more than 10% of the stock of Swiss Re.

Petitioner, Munich Re has no known parent companies and no publicly held companies own more than 10% of the stock of Munich Re.

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Petitioner, Schermer Assuradeuren B.V. has no known parent companies and no publicly held companies own more than 10% of the stock of Schermer Assuradeuren B.V.

Petitioner, El Via Swiss Insurance Company has no known parent companies and no publicly held companies own more than 10% of the stock of El Via Swiss Insurance Company.

Petitioner, Gothaer Gversicherungsbank is wholly-owned by The Gothar Group.

Petitioner, Aim Belgique S.A.has no known parent companies and no publicly held companies own more than 10% of the stock of Aim Belgique S.A.

Petitioner, Delta Lloyd Schade is wholly-owned by Aviva PLC.

Petitioner, Le Continent has no known parent companies and no publicly held companies own more than 10% of the stock of Le Continent.

Petitioner, Oetker, Ltd. is wholly-owned by Dr. August Oetker K.G.

Petitioner, Exxon Chemical Company is wholly-owned by Exxon Mobil Corporation; and

Petitioner, Lucent Technologies, Inc. has no known parent companies and no publicly held companies own more than 10% of the stock of Lucent Technologies, Inc.

The corporate parent company of petitioner, Cummings Engine Co. is Cummins, Inc.

The corporate parent company of petitioner, AEP Industries is AEP/Borden Industries

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Petitioner, Albert F. Fitzgerald has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, Angelo Brothers has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Anolini Luigi SpA has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, Antares Spa has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, ASC, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, Ausimont SpA has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, Axson North America has no known corporate parent and no publicly held company owns 10% or more of its stock

The corporate parent company of petitioner, B.F. Goodrich is The BFGoodrich Company.

Petitioner, Banff has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, Baris Shoe has no known corporate parent and no publicly held company owns 10% or more of its stock

Petitioner, Benix & Co. has no known corporate parent and no publicly held company owns 10% or more of its stock

The corporate parent company of petitioner, BIC Corporation is Societe BIC S.A.

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The corporate parent company of petitioner, Black & Decker is The Black & Decker Corporation

Petitioner, Blackstone has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Boston Wine Co. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Brinkman has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Car Component Technologies has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Circle Imports has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Classic Imports has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Connors Footwear has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Cosmair Inc., is L'Oreal S.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Crosby & Baker has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Crest Tiles has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Crystal International has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, C.W. Fifield has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, DAL Tile is Dal-Tile International Inc.

Petitioner, Danzas has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Delsee Luggage, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Deroma USA, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Dickson Alberton Mills, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Distributors Metal Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Dufferin Tile has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Easy Day Manufacturing has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Epston Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Euromarket Designs has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Federated Merchandising Group has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Fidelity Stainless Steel has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Fiefield has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Finoli Agroalimentare has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Fried Krupp/ PSL is Fried.Krupp AG Hoesch-Krupp

Petitioner, Fusite Division has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, G.H. Bass & Co., is Phillips Van-Hausen

The corporate parent company of petitioner, Genicom Corp., is Genicom Corporation

Petitioner, Green Bay Supply Co. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Greening Donald Co. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Harris Welch has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Hastings has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hoboken Floors has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Hoffman LaRoche is Roche Holding

Petitioner, Hoffman Carbon, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Independent Machinery has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, International Flavors & Fragrants is International Flavors & Fragrances Inc.

Petitioner, Kobrand Corporation has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Lalique North America has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Louis Mian has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, M.S. Walker has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Maple Terrazzo has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Masciarelli Wine Co. has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Maxwell Shoe Co., is Maxwell Shoe Company, Inc.

Petitioner, Mayrand Ltd. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Meadows Wye has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Metal Center Rochester has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Metco Tile Distributors has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Midwest Truck & Auto Parts Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mobility Systems has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mondial Dry Cleaning has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mouli Manufacturing Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, North American Shippers Association has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Peerless Import has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Peleton has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Princess House, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, R&R Marketing has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Rittal Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Salton Maxim has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Salov North America has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Savona has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, San Pellegrino has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Seagrams is The Seagram Company Ltd.

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Petitioner, Socks & Accessories has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Solvay Chemicals is Solvay S.A.

Petitioner, Spirec NA has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Tandler Textiles has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, TCMBandt has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Tico Titanium Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, TJX Companies, Inc., is The TJX Companies, Inc.

Petitioner, Trefilabed Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Tyfield Importers Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Valbruna Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Venture Tape Corporation has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Villeroy & Boch has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Westchester Marble & Granite has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Wayne Tile has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Webster Valve has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Wilson UTC Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Y.M.F. Carpet has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, American Commercial has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, International Building Export Trade s.r.l has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Marcuse Glues & Chemicals has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Fuisz Technology has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Raychem Corporation has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Long Island Pipe & Supply, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Can-American Foods Ltd. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Copreci S. Coop has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, New England Household International has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mapfre Industrial S.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Industrias Roko S.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, J.F. Hillebrand / Team S.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Zilmet dei Fretelli Benettolo SpA has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, ALF UNO SpA has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Eddie Rose Collection has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, LaForesta S.r.l. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Italstuhl has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Astoria S.r.l. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Sinesta 2 S.p.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, William Smethurst has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Apolo=s has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Pasquale Food Imports has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Home Essentials has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Itamobili Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Rizzoli, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Martex Furniture has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Newton Buying Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Smethurst & Son has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Bennett has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Encore Shoe Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Kysela Pere et Fils Ltd. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Adamba Imports International has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Advanced D.C. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, ALF UNO S.p.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Allied International has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Banff has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Boston Wine Co. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, C. Bruno & Co. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Comprador has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Conestoga has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Daylor Creations has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Eastern Imports Ltd has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Eddi Rose Collection has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Euro American has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Hermes of Paris is Hermes International SA

Petitioner, Infolog has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Jaydor Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, MidWest Transportation has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Limax has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Albini & Pitigliani has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, M.S. Walker has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Nomalas has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Nordberg Sales Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Pasternak Baum has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Ranin has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Ricoh Corporation is Ricoh Company, Ltd.

Petitioner, R.L. Pritchard has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Rykoff-Sexton has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Sea Gull has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Smethurst & Sons has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Stanley Works is The Stanley Works

Petitioner, Strohmeyer & Arpe has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Supertrends has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Henry P. Thompson has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Tower Group International has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Uneeda Enterprise has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Velsicol Chemical Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Zambiti Parati S.p.A. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Loh Optical Machinery, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, SI Handling has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Trace International Holding has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Taco, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Santa Maria Foods Ltd. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Midwest Transatlantic Lines has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Mikasa Canada has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Acciaierie Valbruna has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, DO.CA srl has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Newton Buying Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Tower Group International has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Maline Tile has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Dinico Products has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Gilmore Furniture has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Bayard Sales Corp. has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mrs. Brenca Lucia has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Peg Perego has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Morse Manufacturing has no known corporate parent and no publicly held company owns 10% or more of its stock.

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The corporate parent company of petitioner, The Atlantic Mutual Companies - marine business is Travelers Property Casualty Corp., who has now merged with St. Paul Companies, Inc.

Petitioner, Chubb Group of Insurance Companies has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, CNA has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, General Accident Insurance Company has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Gulf Stream Insurance Co., Ltd. (Ireland)has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hannover International GmbH has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, La Fondiaria Assicurazioni has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Protection Mutual Insurance Company has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Royal & Sun Alliance Insurance Group plc is Travelers Property Casualty Corp., who has now merged with St. Paul Companies, Inc.

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Petitioner, SAI Societa Assicuratrice Industriale has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Toro Assicurazioni has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Winterthur Assicurazioni has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Zurich International Italia has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Polaris Assicurazioni has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Riunione Adriatica Di Sicurta has no known corporate parent and no publicly held company owns 10% or more of its stock.

The corporate parent company of petitioner, Schreiber Foods International, Inc. is Schreiber Foods Inc.

Petitioner, YMT International Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of YMT International Inc.

Petitioner, The Channel Corporation has no parent corporation and no publicly-held company owns 10 % or more of the stock of The Channel Corporation.

The corporate parent company of petitioner, Louis Dreyfus Corporation is S. A. Louis Dreyfus & Cie.

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Petitioner, Domus Design Center, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Domus Design Center, Inc.

Petitioner, A.S.I. Stone Imports, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of A.S.I. Stone Imports, Inc.

Petitioner, Mattel, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Mattel, Inc.

Petitioner, Comaro USA Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Comaro USA Inc.

The corporate parent company of petitioner, L'Oréal Group is L'Oréal [a French société anonyme].

Petitioner, De Longhi S.p.A. has no parent corporation and no publicly-held company owns 10 % or more of the stock of De Longhi S.p.A.

The corporate parent company of petitioner, Philips Corp. is Koninklijke Philips Electronics N.V.

Petitioner, De Vitrite Fabriek B.V. has no parent corporation and no publicly-held company owns 10 % or more of the stock of De Vitrite Fabriek B.V.

Petitioner, Goodmark Aerosol Company Limited has no parent corporation and no publicly-held company owns 10 % or more of the stock of Goodmark Aerosol Company Limited

The corporate parent company of petitioner, Aston Martin Lagonda Limited is the Ford Motor Company.

Appendix I

The corporate parent company of petitioner, Ikea Wholesale Inc. is INGKA Holding B.V.

Petitioner, Eaton Corp. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Eaton Corp.

The corporate parent company of petitioner, Thomson Consumer Electronics, Inc. is Thomson [a French société anonyme].

The corporate parent company of petitioner, Coach Leatherware Company, Inc. is the Coach, Inc.

Petitioner, Tupperware Corp. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Tupperware Corp.

Petitioner, Tyfield Importers, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Tyfield Importers, Inc.

The corporate parent company of petitioner, Mascotech Forming Technologies is Metaldyne Corp.

The corporate parent company of petitioner, Syratech, Inc. is Syratech Corp.

The corporate parent company of petitioner, J. Baker, Inc. is J. Baker Corp.

The corporate parent company of petitioner, Air Express International, Inc. is Deutsche Post AG.

Petitioner, CRP Industries, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of CRP Industries, Inc.

Appendix I

Petitioner, France Voiles Co., Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of France Voiles Co., Inc.

The corporate parent company of petitioner, The Rockport Company, Inc. is Reebok International Corp.

Petitioner, Med USA Corp. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Med USA Corp.

The corporate parent company of petitioner, McCormick & Company is McCormick & Co., Inc.

Petitioner, John Turano & Sons, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of John Turano & Sons, Inc.

Petitioner, Caterpillar, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Caterpillar, Inc.

The corporate parent company of petitioner Albany Insurance Company is Peerless Indemnity.

The corporate parent company of petitioner Cigna Insurance Company of Europe is Cigna Corporation is.

Petitioner, Continental Marine Insurance Company Ltd. has no corporate parent and no publicly-held company owns 10% or more of its stock.

The corporate parent company of petitioner DuPont Printing and Publishing is E.I. DuPont De Nemours & Co. Inc.

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Petitioner, E.I. DuPont De Nemours & Co. Inc. has no corporate parent and no publicly-held company owns 10% or more of its stock.

The corporate parent company of petitioner Fidelity and Guaranty Insurance Company is St. Paul Travelers Companies Inc.

The corporate parent company of petitioners, Indemnity Insurance Company of North America and Insurance Company of North America, is ACE, INA, a division of the ACE Group of Companies.

Petitioner, Menorah Insurance Company has no corporate parent and no publicly-held company owns 10% or more of its stock.

The corporate parent company of petitioner Migdal Insurance Company Ltd. is Migdal Insurance and Financial Holdings Ltd.

The Israel Phoenix Assurance Company Ltd. has no corporate parent and no publicly-held company owns 10% or more of its stock.

The corporate parent company of petitioner The Magen Insurance Company Ltd. is Migdal Insurance Company Ltd.

Petitioner, Reliance Insurance Company, has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Intercargo Insurance Company, has no corporate parent and no publicly-held company owns 10% or more of its stock.

Appendix I

Petitioner, Washington International Insurance Company, has no corporate parent and no publicly-held company owns 10% or more of its stock.

Petitioner, Warta Insurance and Reinsurance Company S.A. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Warta Insurance and Reinsurance Company S.A.

Petitioner, Polcontainer Co. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Polcontainer Co.

Petitioner, SAMP/USA, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Polcontainer Co.

Petitioner, Reliance Insurance Company has no parent corporation and no publicly-held company owns 10 % or more of the stock of Polcontainer Co.

Petitioner, Robert Reiser & Company, Inc., has no parent corporation and no publicly-held company owns 10 % or more of the stock of Robert Reiser & Company, Inc.

Petitioner, BNP Distributing Co., Inc., has no parent corporation and no publicly-held company owns 10 % or more of the stock of BNP Distributing Co., Inc.

Petitioner, Allura Imports, Inc. has no parent corporation and no publicly-held company owns 10 % or more of the stock of Allura Imports, Inc.

Petitioner, Qualipac Corporation, has no parent corporation and no publicly-held company owns 10 % or more of the stock of Qualipac Corporation.

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Petitioner, Friendly Fruit, Inc., has no parent corporation and no publicly-held company owns 10 % or more of the stock of Friendly Fruit, Inc.

Petitioner, Transflow Energy, Inc., has no parent corporation and no publicly-held company owns 10 % or more of the stock of Transflow Energy, Inc.

Petitioner, Charmer Industries, Inc., has no parent corporation and no publicly-held company owns 10 % or more of the stock of Charmer Industries, Inc.

Petitioner, Palm Bay Imports, Inc., has no parent corporation and no publicly-held company owns 10 % or more of the stock of Palm Bay Imports, Inc.

Petitioner, Arriflex Corporation, has no parent corporation and no publicly-held company owns 10 % or more of the stock of Arriflex Corporation.

Petitioner, Lumbermens Mutual Casualty Company has no parent corporation and no publicly-held company owns 10 % or more of the stock of Lumbermens Mutual Casualty Company.

Petitioner, American Motorists Insurance Company has no parent corporation and no publicly-held company owns 10 % or more of the stock of American Motorist Insurance Company.

Petitioner, Timberland Company has no parent corporation and no publicly-held company owns 10 % or more of the stock of Timberland Company.

Petitioner, Abel & Schaefer, Inc. has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, A. Clifton, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Agricola Conservera, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Air Techniques, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Albini & Pitigliani SPA, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Albion Insurance Company Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Alfred Balguerie S.A., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Allesiure Corporation, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Allied Signal, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Alpi USA, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Alpina Insurance, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, ALS SRL, has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, ASG USA, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Arley Wholesale, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Art Logistics, Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Atege, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Barthco International, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Bortesi & Company, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Boston International, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Bramati Marble & Granite, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Brastile, Brazos Sportswear, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Brunco Milella & Co., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Appendix I

Petitioner, Buchtal Corp. USA, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Carleton Woolen Mills, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Cassel Imports, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Cincinnati Milacron, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, C.J. International, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Classic Wine Imports, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, CML Group, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, C.M. Rolph, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Con Protec, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Continental Worsted, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Core-Tek Products, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Appendix I

Petitioner, Creative Technologies, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Crown Automobile Sales Co., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Crown Delta Corp., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, C.S.S. Industries, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Daniel Young, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, D. Coluccio & Sons, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Demptos Glass Company LLC, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Dycem, Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Edward Elgar Publishing, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, EFCO Importers, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Emile Henry USA, has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Euinta Handelsges MbLt, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, F.A.M. Bohlke Veneer Corp., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Ferromatik Milacron, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Filene's Basement, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Fleet Bank National Assoc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Florian Papp, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Forte Cashmere Co., Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Frank Ehrensteit, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, F.T.I., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Fuji Flim Micordisks USA, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Fuji Magnetics GMBH, GC America, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Gebroder Hirdes Int'l Sped Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Gee & Garnham Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Gerrit J. Verburg Co., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Gilde Braverei, Global Imports, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, G.M. Crocetti, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Conrand Gosiger, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hadaikan Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hascoe Associates, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hauni Richmond, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Appendix I

Petitioner, Hillebrand Mainz, Hirdes Freight Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hispanagar S.A., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Home Essentials & Beyond, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, H. Verby Co., IHW, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Interplak Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, International Tile & Stone, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Jacques Cohen Corp. of NJ, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, JBF Maschinen BMBH, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, J.D. Craft, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Jeneric Pentron, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, JFC International, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, J.F. Moran Co., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, J. Klein & Company, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Joan and David Helpern, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, K-3 Corporation, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Karl Heniz Dietrich GMBH, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Kerr Corporation, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Krautica Pharma GMBH & Co., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Lemforder Corporation, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Linon Home Décor Products, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Maline Tile Company, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mannesmann Demag Corp., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mannington Mills, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Marbel & Granite, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Marlo Furniture, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Marston Books Service Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Maryland Tile Center, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Maxim International, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Maxwell Shoe Company, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Mia Foods, has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Mixpac Systems AG, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, MSAS Cargo Int'l., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Natural AG, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Nourieh Brothers, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Orlando Food Corp., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Pacific Traning Co., Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Paris Ceramics, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Pastifico Lucio Garofolo S.P.A., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Polyclad Europe A.S., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Polygal USA, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Appendix I

Petitioner, Pro Bake, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Pro Freight Brokers, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, P.T. Bali Maya Permai, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Plymouth Mill, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Puran Foods Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Querolo USA, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Raffaele Viscardi SRL, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, R.I. Dozorets, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Rohm and Haas Company, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Schenker International, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Seeam Allgem Transportges, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Appendix I

Petitioner, MGH, Servolift Eastern Corporation, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Sinco, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Smith & Hawken, Sparex, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Sun Air System Awning Sun Limited, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, S.T.I.C., Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Titon Industries, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, United Abrasives, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, U.S. Marble Importers, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Watts Regulator Co., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Whitehall Co., Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Wilkstone Contractors, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, William Grant & Sons, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Wilson Freight Systems, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Wine & Spirits Shippers Assoc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Witex AG, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, W. Rondina, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, XC Corp., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Yvon Mau Wines, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Z.F. Industries, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Zurich International Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Zurich International (UK) Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Zust Ambrosetti, Inc., has no known corporate parent and no publicly held company owns 10% or more of its stock.

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Petitioner, Allianz Insurance Company of Canada, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Fireman's Fund Insurance Company, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Hartford Fire Insurance Company, has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Independent Insurance Co., Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, New India Assurance Co., Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

Petitioner, Tokio Marine and Fire Insurance Co., Ltd., has no known corporate parent and no publicly held company owns 10% or more of its stock.

APPENDIX J — STATUTES OF THE REPUBLIC OF KOREA

CIVIL ACT

* * *

CHAPTER V TORTS

Article 750 (Definition of Torts)

Any person who causes losses to or inflicts injuries on another person by an unlawful act, wilfully or negligently, shall be bound to make compensation for damages arising therefrom.

* * *

Article 766 (Prescription in Respect of Right to Claim for Damages)

(1) The right to claim for damages resulting from an unlawful act shall lapse by prescription if not exercised within three years commencing from the date on which the injured party or his agent by law becomes aware of such damage and of the identity of the person who caused it.

(2) The provisions of paragraph (1) shall also apply if ten years have elapsed from the time when the unlawful act was committed.

* * * *

APPENDIX K — STATUTES OF THE REPUBLIC OF KOREA

PRODUCT LIABILITY ACT

Act No. 6109, Jan. 12, 2000

Article 7 (Time Limitations, etc.)

(1) The right for damage under this Act shall be extinguished by prescription if the injured person or his legal representative does not exercise their rights within three years from the date on which the damage and the person liable therefor under the provisions of Article 3 have come to the knowledge of either of them.

(2) The right for damage under this Act shall be exercised within 10 years from the date on which a manufacturer supplies a product causing damage: *Provided*, That with respect to damage caused by any substances which are accumulated in human's physical body and, in turn, hurt his heath, or any other damage the symptoms of which appear after a lapse of a certain latent period, the aforesaid period shall be reckoned from the date on which the damage occurs actually.

* * * *

ADDENDA

(1) (Enforcement Date) This Act shall enter into force on July 1, 2002.

(2) (Applicable Cases) This Act shall apply to products supplied by a manufacturer on or after the enforcement date of this Act.

APPENDIX L — LETTER FROM VINCENT M. DeORCHIS OF DeORCHIS & PARTNERS, LLP TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 10, 2005

January 10, 2005

Via Telefax: 212-857-8710 and Hand Delivery

Ms. Roseann B. MacKechnie
Clerk of Court
U.S. Court of Appeals, Second Circuit
Thurgood Marshall United States Courthouse
40 Centre Street
New York, NY 10007

Re: Rationis Enterprises Inc., v. Hyundai Mipo Dockyard,
Docket Number: **04-4267-cv**
Date of Oral Argument: **January 4, 2005**.
Our File: 730-302A

Dear Ms. MacKechnie:

We write in response to your letter of January 5, 2005 seeking more information on behalf of all cargo interests in the above-referenced appeal currently pending before the Second Circuit. We address each numbered point as follows:

1. The Identities of the Cargo Interests

Upon information and belief, of a total of ***771 claimants***, cargo interests have determined the following information concerning their identity:

Appendix L

U.S. claimants: 599	Foreign claimants: 172	**Ratio: 77.7% U.S.**
U.S. consignees: 572	Foreign claimants/ consignees: 61	**Ratio: 90.4% U.S.**
U.S. underwriters: 27	Foreign underwriters: 111	**Ratio: 19.6% U.S.**[1]
U.S. freight-forwarders/ NVOCC: 4	Foreign freight-forwarders/NVOCC: 1	**Ratio: 80.0% U.S.**

It should be noted that most of the cargoes were sold on a traditional "C.I.F." basis which would transfer the title to the cargo at the port of loading. Hence, as discovery on damages proceeds in this case, it may reveal that there are larger numbers of American receivers who hold title to the cargoes than reflected in the above table.

During oral argument, Mr. DeOrchis advised the Court that there were 440 U.S. claimants and 12 U.S. underwriters based on the calculations that were performed during the motion for summary judgment in January 2003. Those figures were compiled from various sources including the S.D.N.Y. Local Rule 26.1 disclosures and Claims and Answers in the Limitation Proceeding. The information does not appear in the Rule F Statement, which was prepared based on the Claims and Answers, but unfortunately does not include the addresses of the parties. Mr. DeOrchis apologizes to the Court for referring to the Rule F.

However, there is a substantial amount of documentation in this case from which HMD had the opportunity to confirm the identity and nationality or base of operation of most claimants. This information includes:

1. Cargo interests agree with the statement found at p. 9 of HMD/HC's Reply brief stating that, "the insurers' nationalities are of no import," in determining choice of law.

Appendix L

A. The Claim and Answer of Messrs. Badiak Will & Maloof dated June 12, 1998 (Docket #105-108);

B. The Claims and Supplemental Claims and Answers of Messrs. Hill Rivkins dated June 12, 1998 (Docket #99); June 15, 1998 (Docket #119); November 9, 1998 (Docket #233); November 30, 1998 (Docket #250-51); December 1, 1998 (Docket #289, 290);

C. The Complaint of Messrs. Kennedy Lillis dated August 18, 1998 as well as the S.D.N.Y. Rule 26.1 disclosures provided to counsel for HMD/HC dated July 30, 1999 and July 12, 2000 (See attached Affidavit of John T. Lillis Jr. dated January 10, 2005 and attached hereto as Ex. 1);

D. S.D.N.Y. Rule 1.9 Certificates filed Messrs. Bigham Englar on behalf of their claimants (see Docket #92);

E. S.D.N.Y. Rule 1.9 Certification filed Messrs. Donovan Parry (Docket #113) and schedule of claimants, including addresses that were served by Messrs. Kim & Chang in Korea on HMD's Korean counsel by fax on December 15, 2000 (see Ex. 2);

F. Answers and Claims filed by Messrs. Cozen O'Conner dated June 12, 1998 (Dockets #102-104);

G. Amended Response by Messrs. Kenny & Stearns to S.D.N.Y. Rule 26.1 Disclosure to HMD filed on May 10, 2000 (Docket #440);

Appendix L

H. S.D.N.Y. Rule 26.1 Statement provided by Messrs. Miller Williamson to HMD/HC counsel on August 15, 2000 attached as Ex. 13(h) to Volume 1 of HMD/HC documents responding to the Court's January 5, 2005 request.

Furthermore, there is a substantial amount of documentation which has been produced to HMD, which although not part of the court record, has been available to HMD/HC for purposes of notice and verification of nationality of claimants:

a. The MSC CARLA official manifest which lists cargo by container and provides the name and address of receiver. (Bates 014347-015096).

b. Extensive production of claims documentation to HMD's counsel by each of the cargo interests on or about October 31, 2004 in compliance with the trial court's order concerning discovery on damages.

c. Statements by Messrs. Hill Rivkins, Waesche Shienbaum, Donovan Parry, Kennedy Lillis, Cozen O'Connor, Bigham Englar and Badiak Will setting forth the nationality of their respective claimant as can be presently determined form the documentation which is attached hereto as Ex. 3.

It should be noted that the trial court bifurcated this case very early in the proceedings. Therefore, there was no

discovery which would have identified the citizenship of the claimants at least in respect to damages.

2. Service of Anti-suit Injunction Motion Papers

Appellees confirm that all cargo interests received courtesy copies of the 1999 anti-suit injunction motion filed by Cummins Engine Co., AEP Borden Industries and Angelo Brothers Co. Since Cummins, AEP Borden and Angelo Brothers were and still are the only parties that were served by HMD in the Ulsan District Court Declaratory action, only those cargo interests had standing to make the anti-suit injunction reply brief as requested.

3. October 26, 2001 Hearing and Issues of Choice of Law

Unfortunately, it appears from the court reporter's office of the SDNY that there is no transcript of the proceeding before Judge Owen on October 26, 2001. However, notes were taken of the proceeding by co-counsel Frank O'Regan. He has prepared an affidavit which is attached as Ex. 4 together with a copy of his contemporaneous notes. The notes confirm Mr. DeOrchis' own recollection that he did not seek to invoke a foreign law during that conference, as is alleged in the affidavit of Mr. Dillon (A-50).

Mr. DeOrchis and cargo claimants had from the inception of the case against HMD/HC been discussing U.S. products liability law. Mr. DeOrchis' statement to Judge Owen during the course of the October 26th conference was to determine what foreign law HMD and HC were alleging. This is because on a number of occasions, including the depositions in Korea,

in May 2000, HMD's counsel had been pointedly asked by cargo claimants what foreign law they were alluding to during discussions and no answer was ever received. Judge Owen asked the parties to work out the issue of what law(s) were being relied upon by HMD/HC. Mr. DeOrchis suggested that "briefs should do it." Mr. DeOrchis, after consulting with other counsel representing cargo interests who were present at the hearing, confirms that the purpose of this statement was to make clear to Judge Owen that the issue of invocation of foreign law could be handled on briefs. It is Mr. DeOrchis' recollection and that of the other cargo counsel who were present at the conference that cargo interests never intended to take the laboring oar in respect to the ambiguous defense of "foreign law" by HMD. It was assumed that because this was an affirmative defense, HMD would go forward on the issue. In fact, HMD did not go forward on the issue of foreign law until it filed its motion for summary judgment on August 21, 2002.

It should be noted that the primary purpose and topic discussed at the October 26, 2001 conference was the consequences of the remand and decision of the Second Circuit in respect to the original anti-suit injunction which was sought by Messrs. Donovan Parry.

We also note that the October 18, 2002 Declaration of Mr. Dillon (A-350) was not contested because it was a "Reply Affidavit" (A-349), and Appellees were not permitted any further filing under the Federal Rules.

Appendix L

4. Defense of Lack of Personal Jurisdiction

In respect to HMD/HC's affirmative defense of lack of personal jurisdiction, the defense was raised in the Answer filed by each defendant to North of England's complaint dated July 2002. However, neither HMD nor HC made any effort to move against North of England in respect to the personal jurisdiction defense up until the time of trial at the end of April 2003. The reference by HMD's counsel in its letter to the Court dated January 9, 2005 that the defense was protected in their "Conclusions of Law" and Post-Trial Memorandum only confirms that there was no effort by HMD or HC to act on the defense of lack of personal jurisdiction until trial. It should be noted that the Conclusions of Law were filed on April 16, 2003 (tab 25 to Volume II of Appellant's docume6ts responding to the Court's January 5, 2005 letter). This was only six days before the trial began on April 22, 2003.

5. Summary Judgment Papers

The documents supplied by Appellants in their January 9, 2005 submissions are an accurate and complete copy of the Summary Judgment motion papers.

Very truly yours,
DEORCHIS & PARTNERS, LLP
By s/ Vincent M. DeOrchis

cc:

Mr. Gregory Coleman, (via Federal Express with attachments);
All other counsel (via U.S. mail without attachments).

APPENDIX M — LETTER FROM EDWARD C. RADZIK OF DONOVAN, PARRY, ET AL. TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED FEBRUARY 17, 2005

February 17, 2005

Ms. Roseann B. MacKechnie,
Clerk of Court
United States Second Circuit Court of Appeals
40 Foley Square
New York, New York 10007

Re: *Rationis Enterprises, Inc. of Panama, et al. v. Hyundai Mipo Dockyard Co., Ltd., et al.*, 04-5571-cv, and 04-6028-cv

Dear Ms. MacKechnie:

On behalf of Appellees/Cargo Interests in the above referenced matter, we submit this letter in opposition to Appellants'/HMD's and HC's letter brief dated February 7, 2005. Cargo Interests respectfully request that the Court affirm the anti-suit injunction order issued by the Southern District of New York on September 30, 2004, as modified on November 8, 2004.

It is undisputed that the two Korean actions sought a resolution of the same legal and factual issues determined by the Southern District on July 12, 2004 following a fourteen-day trial on the issue of HMD's and HC's liability. Prior to the Southern District's decision on the merits, the

Korean actions had been dormant for over four years. (Jung Decl., ¶10: **Att. A**).[1] Upon receipt of notice that the Ulsan Court had scheduled a hearing for October 1, 2004, to revive HMD's dormant Korean declaratory actions, the Southern District conducted two hearings via telephone on September 23 and September 24 on the issue of whether the parties should be enjoined from further participation in the Korean actions. (Appellants' **Atts. 3 & 4**). The September 30, 2004 anti-suit injunction was issued after the District Court afforded both parties the opportunity to brief the issue and to submit proposed orders and counter-orders.

At the October 1, 2004 hearing, the Ulsan Court ruled that the Korean actions would continue notwithstanding the Southern District's decision on liability and the September 30, 2004 Order enjoining the parties from further participation in the Korean actions.[2] Thus, the Southern District's modification order was issued to enjoin HMD and HC from pursuing the actions in Korea given that the Ulsan Court did not believe that it was bound by the Southern District's initial Order. Pursuant to the Southern District's

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1. According to Hae Duk Jung, the Ulsan Court hearings were suspended on July 21, 2000. Despite the fact that the Second Circuit vacated a prior Southern District injunction on August 2001, HMD never made any attempt to revive the Ulsan Court proceedings.

2. Also, in connection with the October 1, 2004 hearing in Ulsan, HD filed a Brief requesting *inter alia* that the Korean actions go forward and stated in part that the Southern District's decision determining the merits on liability was an "illegal judgment." (HMD's Korean Brief, p. 3: **Att. B**).

modification order, the Korean actions were voluntarily dismissed by HMD without prejudice.[3]

The circumstances of this case exemplify one of the limited circumstances in which an anti-suit injunction enjoining a foreign action from proceeding is not only proper, but necessary to defend the legitimacy of the U. S. court system and its decisions.

It is well settled that United States courts have the power to enjoin parties properly before them from proceeding with or initiating suits in foreign jurisdictions. *Laker Airways Ltd., v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984); *Paramedics Electromedicina Commercial, Ltda., v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645, 652 (2d Cir. 2004). This power is always tempered by the United States' interest in promoting and protecting the principle of international comity. *Paramedics*, 369 F.3d at 652. An oft cited maxim in cases contemplating anti-suit injunctions is that "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, *at least until a judgment is reached in one which can be pled as res judicata in the other.*" *Laker Airways*, 731 F.2d at 926-7; *China Trade v. MV Choong Yong*, 837 F.2d 33 (1987) (emphasis added). Thus, once a decision is reached by a United States court, the court's power to enjoin a foreign court from addressing the issues it has already decided becomes warranted. *See id.*

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3. For a more detailed recitation of the relevant facts, Cargo Interests respectfully request that the Court refer their Opposition to HMD's and HC's Motion for Stay Pending Appeal of the Antisuit Injunctions, filed on November 19, 2004.

Appendix M

The majority of the cases dealing with anti-suit injunctions concern situations in which the U.S. court has not yet reached a decision on the merits. *See e.g. China Trade*, 837 F.2d 33 (1987). In these cases, the most significant factors sustaining anti-suit injunctions are "whether the foreign action threatens the jurisdiction of the enjoining forum, and whether strong public policies of the enjoining forum are threatened by the foreign action." *Id* at 36. One of these threats will be sufficient to overcome the interest in protecting comity and allow a U.S. court to enjoin a foreign court from addressing a parallel issue. *Id.*

The factors considered by *China Trade* become superfluous, however, once a decision has been reached by a U.S. court deciding an issue that is also pending before a foreign court. *Paramedics*, 369 F.3d 645 (2d Cir. 2004). Reaching a decision is the line of demarcation in these cases because there is significant uncertainty regarding what credence, if any, a foreign court will give a decision reached by a U.S. court. *See id.* at 654. The *Paramedics* Court explaining the need to protect our court's jurisdiction post judgment, stated that "[t]he doctrine of res judicata, where applied, may obviate injunctive relief against re-litigation in a second forum; but a foreign court might not give res judicata effect to a United States judgment, particularly since United States courts 'may chose to give res judicata effect to a foreign judgment on the basis of comity,' but 'are not obliged' to do so." *Paramedics*, 369 F.3d at 654. It is because of the risk inherent in allowing foreign courts to determine whether our decisions are binding that the Second Circuit has consistently recognized that "where one court has already reached a judgment — on the same issues, involving the same parties

— considerations of comity have diminished force." *Id.* at 655; *see also Silva Run Worldwide Ltd., v. Gaming Lottery Corp.*, 53 Fed. Appx. 597, (2d Cir. 2002); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, *aff'd sub nom, Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998).

In this case, all of the elements warranting an anti-suit injunction are present. Both the Korean actions and the District Court action encompass the same issues and involve nearly the same parties.[4] Both actions seek a determination

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4. Appellants' argument that the injunctions fail the threshold test because the parties are not identical is without merit. *China Trade* does not require the parties to both actions to be "identical" for a court to properly issue an anti-suit injunction. *China Trade*, 837 F.3d at 36. Cases following *China Trade* have instead held that what is required is that the parties be substantially similar. *Paramedics*, 369 F.3d at 652; *Motorola Credit Corp. v. Uzan*, 2003 U.S. Dist. LEXIS 111, *6 (S.D.N.Y. Jan. 7, 2003. Appellants' assertion that HMD and HC are not related is contradicted by the Affidavit of Man Shin Jeon, stating that HMD and HC are related companies. (Jeon Aff. ¶ 3: **Att. C**). The assertion is also contradicted by the fact that HC contracted to lengthen the vessel and nominated HMD as its subcontractor and an employee of HMD signed the lengthening contract on behalf of HC. (Trial Trans., pp. 1183-4: **Att. D**). Regardless, HMD was a party to both the U.S. and Korean actions. That HC had not joined the Korean actions is of no relevance. HC, having been found liable in the U.S. proceedings, could commence an action in Korea independently or with HMD. Anti-suit injunctions are permissible to enjoin initiation of actions, not just pending actions. *Laker Airways*, 731 F.2d at 926. As long as there is the potential for foreign actions to commence or continue that threaten the jurisdiction and integrity of the District Court, it is proper to enjoin parties to the U.S. action from pursuing similar actions in Korea. See *Paramedics.*

of whether HMD and/or HC are liable for Cargo Interests' losses suffered in connection with the casualty of the M/C MSC CARLA in 1997. On July 12, 2004, the Southern District found both HMD and HC liable for Cargo Interests' losses. *In Re Rationis Enters*, 325 F. Supp. 2d 318 (S.D.N.Y. 2004). In addition to making a final determination on the issue of liability, the Southern District issued two prior decisions in this case making final determinations on the issues of jurisdiction and choice of law.[5] *Cummins Engine Co. v. Hyundai Mipo Dockyard*, 210 F. Supp. 2d 421 (S.D.N.Y. 2001)(finding that the Southern District properly exercised personal jurisdiction over HMD and HC); *Cummins Engine Co. v. Hyundai Mipo Dockyard.* 2003 U.S. Dist. LEXIS 2226 (S.D.N.Y. Jan. 27, 2003)(determining that U.S. law would apply to the resolution of the case). Thus an anti-suit injunction, enjoining the parties from proceeding in Korea, is not only necessary to protect and ensure enforcement of one decision made by the district court, but it is necessary to uphold *three* separate decisions and

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5. Appellants' argument that the issues involved in this action and the Korean actions are not the same because they seek adjudication under different laws (U.S. v. Korean) is a distortion of the threshold requirement. What law applies is a dispositive issue before *both* courts. The Southern District already determined that U.S. law applies. Thus, the anti-suit injunction is needed, in part, to ensure that the choice of law determination in enforced. The need for a determination under foreign law might be significant if HMD and HC could claim rights under Korean law that they do not have under U.S. law. *See Paramedics*, 369 F.3d at 653, n.3. That is not the situation here; HD and HC are seeking to avoid liability by arguing application of foreign law. This argument does not defeat the legitimacy of the injunction. *See id.*

determinations made by the district court over a four year period while the Korean actions languished.

When a U.S. court endeavors to make a decision determining the rights and liabilities of parties properly before it, the court has an inherent interest in ensuring that its decisions are implemented and respected. Protecting this interest is inherent in protecting the integrity and legitimacy of the U.S court system. Thus, when there is a risk that a foreign court not will afford due regard to U.S. decisions, it becomes necessary for our courts to take steps to protect them. *See Paramedics*, 369 F.3d at 655. This risk is palpable in the present circumstances. The Ulsan District Court has shown that it will not exercise comity toward the Southern District of New York in this case. The Ulsan Court refused to respect the Southern District's initial anti-suit injunction or afford any consideration to the decision on liability. Additionally, Cargo Interests' Korean counsel advise that the Korean Court will review the judgments of the Southern District only as evidence, along with other evidence, indicating that no preclusive effect will be given regardless of the stage of the U.S. litigation. (Chung Decl.,¶ 4: **Att. E**). These facts create more than speculation that the Korean Court will not afford preclusive treatment to the decisions of the District Court.

HMD's and HC's assertion that the Southern District decision is not entitled to *res judicata* treatment is incorrect[6]

6. Even if a final decision, or a decision entitled to *res judicata* effect, were required, the Southern District's July 12, 2004 decision would easily meet that requirement. The underlying district court

(Cont'd)

and illustrates a fundamental misunderstanding of the case law precedent. The July 12, 2004 decision is clearly a "judgment" and whether or not it is technically entitled to *res judicata* treatment is not the real issue concerning the

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(Cont'd)

case is an admiralty case wherein the determination of liability and damages are completed separately. HMD and HC consented to having the District Court conduct a bifurcated trial. In the context of this type of bifurcated trial, once a decision is reached on the issue of liability, that determination is entitled to *res judicata* effect and cannot be re-litigated. *See Republic of France v. United States*, 290 F.2d 395, 397 (5th Cir. 1961)(citing Second Circuit cases as precedent); *see also Parks v. Poindexter*, 723 F.2d 840, 844 (11th Cir. 1984)("To the extent that issues involved in the remaining portion of the bifurcated case have in fact been litigated and adjudicated in the coverage trial (or could have been) the doctrine of issue preclusion or collateral estoppel would be applicable"). HMD's argument that something akin to the "final judgment" rule should apply in the context of anti-suit injunctions ignores the fact HMD's appeal was brought pursuant to 28 U.S.C. § 1292(a)(3) a federal statute creating a special exception to the final judgment rule when admiralty cases are tried in two stages. *Becker v. Poling Transportation Corp.*, 356 F.3d 381 (2d Cir. 2004). Thus, even though the decision is technically "interlocutory," it would be treated as final as it constitutes complete adjudication on the issue of liability and is appealable.

HMD's and HC's argument that allowing interlocutory orders to form a basis for anti-suit injunctions is "inefficient and damaging to comity" is unpersuasive. It would be far more inefficient to allow the Korean action to proceed only to be precluded by the Court's "final" decision issued at a later date. Additionally, in *Farrell Lines*, the fact that a final judgment had not yet been entered did not affect the Court's holding that the anti-suit injunction was warranted. *Farrell Lines*, 32 F. Supp. 2d at 131.

courts. Neither *Paramedics* nor any of its predecessors held that once a judgment is reached, either a "final" judgment or a *res judicata* analysis was required before a court could issue a legitimate anti-suit injunction. The courts' concern rather, was and is, the uncertainty of how another court in this case the Korean court, would treat its decisions. The Southern District decision has and will be, if the Korean actions are reinstated, pled as precluding contrary findings of fact and law. All indications suggest that preclusive effect will not be afforded. There is not only a risk, but likelihood that the Korean court will give no preclusive effect to the Southern District's decisions.[7] Thus, it is not necessary for a U.S. court to determine the preclusive effect of its own judgments, it is sufficient for the U.S. court to find that it is unknown how the Korean court will treat its decisions. The Southern District's anti-suit injunction was properly issued in order to protect the Court's integrity by ensuring enforcement of its decisions.

HMD and HC rely heavily upon the Third Circuit case of *General Electric Co. v. Deutz AG*, 270 F.3d 144 (2001). This reliance is misplaced. *General Electric* is distinguishable because that Court had assurances that the English court would endorse the decision of the district court. *General Electric*, 270 F.3d at 157 & 159 ("the District Court knew before it enjoined Deutz that the High Court had shown no inclination to disagree with the non-arbitrability ruling"). Here, the situation is just the opposite, there is clear indication that the Korean court *is* inclined to disagree with the U.S. court. Additionally, *General Electric* dealt with a decision by the U.S. court denying arbitration, where as here, the District Court reached a judgment

7. This risk undeniably constitutes "aggregated circumstances" further warranting the anti-suit injunction.

on the merits of the dispute. The Southern District has a stronger interest in protecting its decision on liability, clearly threatened by the Korean court, than the *General Electric* Court had in protecting a decision denying the right to arbitrate which was also subsequently denied by the arbitration panel itself. Notwithstanding the distinctions, *General Electric* supports the issuance of the anti-suit injunction under the facts of this case, stating that "comity promotes predictability and stability in legal expectations." *General Electric*, 270 F.3d at 160. Here, there is no predictability and that is, in essence, why the injunction was necessary.

Similarly, HMD's and HC's reliance on *Laif X Sprl v. Axtel, S.A. de C.V.*, 390 F.3d 194 (2d Cir. 2004) is misplaced. Again, *Laif X Sprl* dealt with a case where the decision sought to be protected was denying the right to arbitrate. 390 F.3d at 196. Thus, in that case, the Court was concerned with the federal policy favoring arbitration, not the concern here for enforcement of the Court's decisions. *Id.* at 199. Here, the U.S. certainly has an interest in protecting the district court decision. As illustrated by Cargo Interests letter to this Court dated January 10, 2005, the majority of the Cargo Interests are U.S. citizens or have their base of operations in the U.S. Thus, the District Court had an interest in preserving the integrity of its own decision and in protecting the interests of U.S. cargo owners and other parties who have their bases of operations here.

HMD and HC incorrectly try to place an additional burden on Cargo Interests of establishing the requirements of Rule 65 for a preliminary injunction including "irreparable injury." However, the cases in this Circuit have not addressed

the need for a showing of "irreparable injury" and the Third Circuit has held that in "considering anti-suit injunctions, we have not specifically evaluated irreparable injury and other Rule 65 requirements, but instead reached only the threshold requirements unique to anti-suit injunctions, namely comity concerns, which we view as more restrictive than the general requirements of Rule 65 . . . if the requirements for an anti-suit injunction are met, these supplant the need for proof under Rule 65." *Stonington Partners Inc. v. Lernout & Hauspie Speech Products N.V.*, 310 F.3d 118, 129 (3d Cir. 2002). Thus, given that the strict standard for allowing anti-suit injunctions has been met and that the injunctions were issued after the decision on the merits and were thus not "preliminary," the Court need not address the requirements of Rule 65.[8]

Lastly, Judge Owen made sufficient findings to support both anti-suit injunction orders and cited the most relevant case precedent *Paramedics*. (Appellants' **Atts. 1 & 2**). Appellants' argument that the requirements of Rule 52(a) were not met, is wholly without merit Additionally, the Southern District had jurisdiction to modify its first order to preserve the *status quo* and effectuate the original order as intended. The Southern District did not abuse its discretion in issuing the anti-suit injunctions, Thus, Cargo Interests respectfully request that the Court affirm the anti-suit injunction as modified.

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8. Notwithstanding, HMD and HC had ample notice before Judge Owen issued the anti-suit injunctions and Cargo Interests do have a threat of irreparable injury. The threat here is that the Korean Court will issue a contradictory ruling that will impair Cargo Interests ability to enforce their judgments against HMD and HC once the quantum of monetary damage due Cargo Interests is adjudicated.

Appendix M

Respectfully submitted,

s/ Edward C. Radzik
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